Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JAMES D. ASKEW, M.D., GINGER BUCK, PHILLIP MAHAN, and the CITY OF NORTHPORT, ALABAMA,

Petitioners,

v.

DCH HEALTH CARE AUTHORITY and WEST ALABAMA GENERAL HOSPITAL, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a quasi-governmental entity, which is not a municipality and which has no political accountability or other such indicia of a governmental body (such as subjection to state sunshine and ethics laws, and elected officials), is entitled to state action immunity from the federal antitrust laws without demonstrating active state supervision merely because the authorizing statute declares it to be a "political subdivision."

LIST OF PARTIES

Petitioners James D. Askew, M.D., Ginger Buck, Phillip Mahan and the City of Northport, Alabama, were the plaintiffs-appellees in the proceedings below. Respondents DCH Health Care Authority and West Alabama General Hospital, Inc. were the defendants-appellants in the proceedings below.[1]

[1] There are no parent or subsidiary companies to be listed.

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PETITION FOR WRIT OF CERTIORARI

Petitioners James D. Askew, M.D., Ginger Buck, Phillip Mahan, and the City of Northport, Alabama, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on July 19, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit has been reported at 995 F.2d 1033 (11th Cir. 1993), and is reprinted in the Appendix hereto at pages 1-18.

The order of the United States District Court for the Northern District of Alabama is unreported, and is reprinted in the Appendix hereto at pages 19-20.

JURISDICTION

Petitioners brought this suit in the United States District Court for the Northern District of Alabama, invoking jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1337. On September 30, 1992, the District Court denied Respondents' motion to dismiss, as well as their alternative motion for summary judgment, without written opinion.

Respondents appealed to the United States Court of Appeals for the Eleventh Circuit, invoking jurisdiction under 28 U.S.C. § 1291. The Eleventh Circuit reversed the decision of the District Court on July 19, 1993 and remanded the case to the District Court for proceedings consistent with its opinion.

Petitioners invoke the jurisdiction of this Court to review the Judgment and Order of the Eleventh Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Health Care Authorities Act of 1982 (Ala. Code § 22-21-310, *et seq.*, as amended in 1987 (Ala. Code § 22-21-350, *et seq.*) and 1990 (Ala. Code § 22-21-357, *et seq.*), is reprinted in the Appendix hereto at pages 21-81.

Sections 1 and 2 of the Sherman Antitrust Act of 1890 (15 U.S.C.A. §§ 1 and 2) are reprinted in the Appendix hereto at page 82.

STATEMENT OF THE CASE

In 1982, DCH Health Care Authority ("DCH") was reincorporated pursuant to resolutions passed by various authorizing subdivisions, including petitioner City of Northport, Alabama. Such resolutions were passed under the auspices of the Health Care Authorities Act of 1982. (Ala. Code § 22-21-310, *et seq.*) This Act was amended in 1987 (Ala. Code § 22-21-350, *et seq.*) and in 1990 (Ala. Code § 22-21-357, *et seq.*).

Under the Health Care Authorities Act, DCH holds no public elections and is exempt from public bidding requirements, the state ethics laws, the open meetings act, and public disclosure of most of its financial records. (Ala. Code §§ 22-21-335, 22-21-334, and 22-21-316). Although DCH's authorizing subdivisions, such as petitioner City of Northport, appoint a majority of the Board of DCH, they must select those appointments from a list of names submitted by DCH. (Ala. Code § 22-21-352). DCH has no obligation to submit additional names if the authorizing subdivisions do not wish to make appointments from the original list; rather, DCH can insist that the authorizing subdivisions appoint one of its initial nominees.

In May, 1992, DCH acquired the stock of a subsidiary of American Medical International, Inc. ("AMI"). AMI, a private hospital and DCH's only significant competitor, had previously transferred all of its assets to this subsidiary corporation; the acquisition, therefore, effectuated a buyout of AMI. DCH undertook this acquisition secretly, requiring its Board members to sign a confidentiality agreement that prevented any disclosure of the acquisition, and otherwise acting to prevent public awareness until the acquisition had been completed.

Shortly after the acquisition became public, the City Council for the City of Northport, Alabama, one of the original authorizing subdivisions of DCH under the statute, passed a resolution opposing the acquisition.

On June 10, 1992, petitioners Askew, Buck and Mahan filed their complaint in the Northern District of Alabama seeking to enjoin DCH and AMI from finalizing the buyout as violative of Sections 1 and 2 of the Sherman Act. Along with their complaint, petitioners filed a motion for a temporary restraining order and preliminary injunction and a memorandum in support of that motion.

In conjunction with their motion for a temporary restraining order and a preliminary injunction, petitioners filed the affidavit of Dr. John Pisarkiewicz, an economic expert with extensive experience in the health care field. Dr. Pisarkiewicz's affidavit testimony established that DCH's acquisition of AMI, coupled with its effective control of another hospital in the area through a long term agreement, gave DCH market shares in the relevant market ranging from 88 to 93% in various measures of market power. Based on these facts, Dr. Pisarkiewicz testified that DCH would (as it subsequently did) gain monopoly power in the relevant market by acquiring AMI.

On June 10, 1992, the district court, Judge Clemon presiding, heard oral argument on the motion for a temporary restraining order and denied the motion without written opinion, citing petitioners' inability to show danger of irreparable injury or a substantial likelihood of success on the immunity issue. The district court set an expedited hearing on the motion for preliminary injunction.

The day after the court denied the temporary restraining order, the respondents filed a Motion to Dismiss, or in the Alternative for Summary Judgment based upon

state action immunity. Petitioners timely filed a response and a motion to amend the complaint to add some facts outlined for the court during oral argument, and to add the City of Northport, Alabama as a plaintiff. The district court granted petitioners' motion to amend. Petitioners also filed a Rule 56 affidavit, outlining petitioners' counsel's belief in his ability to prove facts regarding an absence of immunity given even limited discovery.

On September 30, 1992, Judge Clemon denied respondents' Motion to Dismiss without written opinion. Respondents immediately sought review of Judge Clemon's holding by way of expedited appellate review under the collateral order doctrine.

On July 19, 1993, the United States Court of Appeals for the Eleventh Circuit reversed the decision of the District Court and remanded the case for proceedings consistent with its opinion. In so deciding, the Court relied on its previous decision in *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991). *See* p. App. 11. In *Todorov*, the Eleventh Circuit concluded without discussion that under *Town of Hallie*, "[w]hen the defendant is local governmental entity . . . there is no requirement that the defendant be actively supervised by the state in order to enjoy" state action immunity. *Todorov*, 921 F.2d at 1460, n. 36. Based on this reading of *Town of Hallie*, the *Todorov* court held that because the Alabama legislature had "made any hospital organized pursuant to the Act a local governmental agency" by labeling it a "political subdivision of the state," DCH need only show a clearly articulated and affirmatively expressed state policy to achieve immunity. *Id.* at 1461.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Effectuates An Unwarranted Expansion Of State Action Immunity By Conferring Such Immunity, In The Absence Of Active State Supervision, On Quasi-Governmental Entities Without Political Accountability.

The Eleventh Circuit's decision in the instant case impermissibly broadens the state action immunity doctrine by wholly ignoring the public policy considerations underlying the private actor/municipal actor dichotomy under that doctrine. Relying solely upon the authorizing statute's pronouncement that health care authorities constitute political subdivisions, the court held that DCH should be treated as a municipality for the purpose of determining the applicability of state action immunity. This decision not only contravenes language in long-standing decisions of this Court forbidding the conferral of immunity by fiat, it threatens to destroy the balance between federalism and federal antitrust law by permitting states to abdicate their supervisory responsibility over quasi-governmental actors by merely labeling such entities "political subdivisions."[2] Moreover, the decision legitimizes the anti-competitive conduct of these quasi-governmental bodies although they operate without the responsibility and accountability ensured by a system of checks and balances, thereby creating enormous potential for financial and political abuse of the public trust.

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[2] The statute at issue in this case is not rare. Increasingly, state legislatures, faced with strict budgetary constraints, are conferring broad unchecked powers on quasi-governmental entities in industries such as health care, telecommunications and insurance.

In a series of decisions commencing with *Parker v. Brown*, 317 U.S. 341 (1943), this Court has recognized the doctrine of state action antitrust immunity, which operates to shield state activity from antitrust scrutiny. Because state action immunity is premised on principles of federalism, this Court has conferred immunity solely and uniquely on the state sovereign. Although the state sovereign may authorize other entities to act on its behalf, it may not, by fiat, imbue those other entities with its immunity. *Id.* at 351 ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . ."). *See also Federal Trade Commission v. Ticor Title Insurance Co.*, 112 S. Ct. 2169, 2176 (1992) ("a state may not confer antitrust immunity on private persons by fiat. . . ."). Rather, entities purporting to act on behalf of the state and therefore with the protective cloak of immunity must demonstrate that their actions are truly those of the state.

The rigor of the test applied to determine whether a challenged action can truly be considered that of the state depends upon the identity of the actor. A private party must establish a clearly articulated and affirmatively expressed state policy authorizing the conduct, **and** active supervision of the conduct by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). A municipality, however, need demonstrate only the former element—a clearly articulated and affirmatively expressed state policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). The lighter burden assigned to municipalities arises out of a rebuttable presumption that the structure of municipal governments ensures that they act in the public interest when carrying out state mandates. *Id.* at 45, n.9. Private parties, in contrast, "may be presumed to be acting primarily on [their] own behalf,"

necessitating application of the second prong of the immunity test. *Id.* at 45. This stricter standard is meant to prevent states from insulating unqualified conduct from federal antitrust scrutiny "by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 57 (1985), quoting *Midcal*, 445 U.S. at 106.

In the instant case, the court below implicitly held that quasi-governmental agencies such as DCH automatically warrant application of the abbreviated immunity test.[3] In so holding, the Eleventh Circuit, without discussion or explanation, expanded the *Town of Hallie* decision to include all so-called political subdivisions. This Court, however, has never held that a political subdivision other than a municipality is exempt from the two-pronged test.[4] Moreover, nothing in the language of *Town of Hallie* legitimizes such blind deference to a legislature's characterization of an entity as a "political subdivision" for the purpose of determining immunity.

Significantly, in relieving municipalities from the active state supervision prong of the immunity test, the *Town of Hallie* Court used as the linchpin of its decision the public attributes of a municipality. The Court noted that,

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[3] As the Eleventh Circuit stated, "Despite the language in footnote 9 [in *Town of Hallie*], neither *Town of Hallie* nor any other Supreme Court or Eleventh Circuit case has held that a political subdivision that is not a municipality—i.e. a water authority, a transit authority, a public hospital corporation—is subject to the two-prong test of *Midcal*." *See* p. App. 10.

[4] The cases from other circuits cited by the Eleventh Circuit in support of its position, *see* p. App. 11, n. 10, are distinguishable. Those cases, some of which are discussed below, involved entities whose directors were appointed by elected state officials.

unlike private parties, municipalities tend to act under public scrutiny, subject to mandatory disclosure regulations and electoral review, thereby avoiding the "real danger" presented by private parties—that they would act "to further [their] own interests, rather than the governmental interests of the state." *Town of Hallie*, 471 U.S. at 47. So fundamental did this Court consider public oversight of municipalities to its decision to exempt them from the second prong of the immunity test that it expressly recognized that even a municipality could be shown to act contrary to the public interest. *Id.* at 45 (stating "[w]e may presume, **absent a showing to the contrary**, that the municipality acts in the public interest") (emphasis added). Although the Court did not discuss the significance of such a showing with regard to the application of the immunity test, this dicta mitigates against a rigid private actor/municipal actor dichotomy and blind acceptance of legislative labels.

Rather than reading *Town of Hallie* as a limited exception to the two-prong state action immunity decision, however, the court below used it as a justification for extending the permissive one-prong standard to hybrid entities—those entities such as DCH that are created pursuant to state statute and designated "political subdivisions" but which possess few (if any) of the political checks inherent to municipalities. The court did so *despite* its admission that DCH "is not subject to those safeguards that ensure that a municipality is acting in the public interest." *See* p. App. 10. The proffered justification for its decision—merely that the Supreme Court has not held that a political subdivision other than a municipality is subject to the two-prong test of *Midcal*—highlights just how far afield some appellate courts have gone in conferring immunity

and illuminates the need for direction from this Court regarding the availability of the abbreviated test for hybrid entities such as DCH.

II.

The Eleventh Circuit's Decision Contravenes Decisions By Other Circuits That Mandate Analysis Of An Entity's Functional Characteristics Before Exempting It From The Second Prong Of The State Action Immunity Test.

The court below not only misinterprets the dictates of *Town of Hallie*, it presents an analysis that conflicts with that undertaken by other circuits that have considered the issue of state action immunity. While the Eleventh Circuit blindly accepted the legislature's label of DCH as a "political subdivision" and, using that label, forced DCH into the existing private actor/municipal actor dichotomy, other circuits have adopted a more functional analysis involving independent judicial assessment of the challenged entity's public and private characteristics.

The Ninth Circuit has repeatedly analyzed the characteristics of entities engaged in anticompetitive behavior pursuant to a clear state mandate to determine if those entities must be actively supervised by the state. In *Washington State Electrical Contractors Ass'n, Inc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 439 (1992), the Ninth Circuit considered a second appeal regarding the antitrust immunity of the Washington State Apprenticeship and Training Council ("the Council"), an organization established pursuant to the State of Washington's Apprenticeship Act ("the Act") to issue rules and regulations establishing standards for apprenticeship agreements. *Id.* The Supreme Court had granted certiorari and vacated an earlier judgment of the Ninth Circuit, remand-

ing the case for further consideration in light of *Patrick v. Burget*, 486 U.S. 94 (1988).[5]

On remand, the trial judge determined that the Council was a state agency and found it unnecessary to reach the question of state supervision. However, the Ninth Circuit, focusing on the private attributes of the Council, did not agree:

> It is now apparent, after further briefing and argument, that the Apprenticeship Council may not qualify as a state agency. The council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy.

Washington State, 930 F.2d at 737. The Ninth Circuit then remanded the case to the district court for specific findings and conclusions on both prongs of the immunity test.

The Ninth Circuit also engaged in this functional approach in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). There, the court closely considered the attributes of the Oregon State Bar ("the Bar") before designating it "an agency of the State of Oregon." *Id.* at 1460. In particular, the court emphasized that the records of the Bar are open for public inspection; the Bar's accounts and financial affairs are subject to periodic audits by the State Auditor; and the members of the Bar's Board of Governors are public officials who must comply with the state code of ethics. *Id.* The court concluded that "[w]hen the actor is a state agency **subject to requirements such as those set forth above**,

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[5] It is not clear from this Court's opinion whether it considered the Council to be a public actor, private actor, or combination of the two. If this Court considered the Council to be anything other than a purely private actor, then this Court's decision in *Washington State* would appear to favor petitioners' position.

just as when the actor is a municipality, 'there is little or no danger that it is involved in a *private* . . . arrangement.' " *Id.*, quoting *Town of Hallie*, 471 U.S. at 47. Thus, unlike the Eleventh Circuit, the Ninth Circuit will not include hybrid entities, even state agencies, within the rubric of *Town of Hallie* unless the entities possess the attributes of a municipality which will ensure accountability to the public. *Cf. Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397, 400 n.5 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1168 (1992) (contemplating application of the active supervision prong to the Antelope Valley Hospital District, a not-for-profit hospital district organized under California's Local Hospital District Law, Cal. Health & Safety Code, § 32000).

The First Circuit also considers the attributes of an entity before exempting it from the second prong of the immunity test. In *Federal Trade Commission v. Monahan*, 832 F.2d 688 (1st Cir. 1987), *cert. denied*, 485 U.S. 987 (1988), the FTC notified the Massachusetts Board of Registration in Pharmacy ("the Board") of its intent to investigate three of the Board's rules for unreasonable restraint of competition. *Id.* The Board objected to the inquiry, citing its immunity from federal antitrust laws as a state regulatory agency. *Id.* at 689. The court rejected the Board's contention, holding that "[w]hether any 'anticompetitive' Board activities are 'essentially' those of private parties depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists." *Id.* at 690.[6]

[6] Admittedly, *Monahan* was a subpoena enforcement case such that the First Circuit did not have a complaint outlining the actions of the Board alleged to be anticompetitive. However, the rationale was sound and reflected the court's hesitancy to apply the *Town of Hallie* holding to a hybrid entity without further investigation.

The Sixth Circuit has similarly demonstrated a reluctance to accept superficial labeling and attributes as dispositive on the issue of which immunity test to apply. In *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U.S. 855 (1990), Riverview Investment ("Riverview") brought suit challenging the Ottawa Community Improvement Corporation's ("CIC") denial of Riverview's request for bond approval under, *inter alia*, the federal antitrust laws.[7] CIC claimed immunity from the antitrust laws because of its status as a public entity. The district court, however, found that "CIC was not considered by the State as a municipality, or agency of a municipality," but rather was "a private, non-municipal party." *Id.* at 479.

On appeal, the Sixth Circuit began its analysis by discussing its own opinion in *Consolidated TV Cable Services, Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, 489 U.S. 1082 (1989). There, the Electric and Water Plant Board of the City of Frankfort, Kentucky had created Community Services, Inc., a non-profit, non-stock corporation, to operate a cable TV network owned by the City. Consolidated TV, a private cable company, brought suit based on the denial of its request to extend its cable service into areas served by Community Services. After examining the facts and concluding that the Board had ultimate control of Community Services, the Sixth Circuit found that Community Services was a municipal agent to be treated as such for purposes of the doctrine of state action. *Id.* at 358-59.

[7] CIC is a non-profit corporation contractually responsible for reviewing requests for industrial revenue bonds on behalf of the Village of Ottawa.

Applying the same analysis in *Riverview*, the Sixth Circuit found the municipal control that warranted the treatment of Community Services as a municipality in *Consolidated TV* to be utterly absent from CIC. *Riverview*, 899 F.2d at 479-480. Specifically, the court noted that "although the Village had plenary control over CIC to the extent that it could terminate its existence by passing an ordinance, the Village had no right to appoint CIC members as the Board did in *Consolidated TV*," and "CIC made all appointments without involvement of the Village." *Id.* at 480.[8] Accordingly, the court found that the abstract theoretical power to terminate CIC's existence through the passage of an ordinance was not a sufficient indication that CIC was controlled by the Village. *Id.* Thus, the indicia of control needed to demonstrate that CIC was a municipal agent entitled to state immunity under *Town of Hallie* were absent, and the court treated CIC as a private party.[9]

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[8] Based on these facts, the Sixth Circuit found inapposite the decisions in *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988) (state immunity found without determination of whether the defendant agency was a public or a private entity), and *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032 (2d Cir. 1986) (New York's Urban Development Corporation given state action immunity). For example, two of nine members of the Urban Development Corporation were public officials, and the remainder were designated by the governor and approved by the state senate. CIC, in contrast, appointed its own members with no input from the state or local government. *Riverview*, 899 F.2d at 481.

[9] Significantly, responding to an argument submitted by the Ohio Attorney General, as amicus, the Sixth Circuit stated:

> Because *Hallie*'s grant of immunity is predicated on the fact that the actor's alleged anticompetitive conduct is done pursuant to state policy, the Attorney General argues that the public/private distinction is less a matter of rigid, nominal **classification** than it is a matter of identifying the actor's

(Footnote continued on following page)

Finally, the Seventh Circuit has also espoused a state action immunity inquiry that examines the attributes of the entity engaging in anticompetitive activity. In *Fuchs v. Rural Electric Convenience Cooperative, Inc.*, 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), the court struggled to properly characterize defendant RECC, an unregulated, not-for-profit Illinois corporation owned by nearly 5,000 consumer-members and governed by an elected board of directors. The court refused to arbitrarily label RECC as a "private party" for state action immunity purposes and, instead, focused on RECC's attributes to determine whether it was the state, a state agency, or an "arm of the state" or whether, like a private party, it might seek to further its own interests at the expense of state goals. The court concluded that "[a]lthough RECC has the power of eminent domain, it is not a body politic like a municipal corporation and is not subject to public scrutiny through sunshine laws or the political process." *Id.* at 1217. Only after conducting this inquiry did the court conclude that RECC was a hybrid entity subject to some lower level of supervision than the *Midcal* two-prong test to ensure that it acted pursuant to state policy. *Id.*

It is apparent, therefore, that the Circuit Courts of Appeal are neither certain nor in agreement when applying

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[9] *continued*

function. If the entity is found to be behaving as a public entity pursuing public interests, it should be afforded immunity; if it is pursuing predominantly private interests, it should not be.

Riverview, 899 F.2d at 481. Although the Sixth Circuit found it unnecessary to "rule on the wisdom of the test, since the District Court's conclusions are supported even if analyzed under the Attorney General's framework," it is noteworthy that they devoted almost two pages of the opinion to the suggestion. *Id.*

the abbreviated test announced in *Town of Hallie*. While some circuits have engaged in factual inquiries to determine if entities other than municipalities warrant the protection of state action immunity in the absence of active state supervision, others, such as the Eleventh Circuit, have accepted legislative labels. The disparate interpretation by the circuit courts evidences the need for this Court to further enunciate the principles and parameters of *Town of Hallie*.

CONCLUSION

The Eleventh Circuit's decision eviscerates the public policy reasons articulated in *Town of Hallie* for conferral of state action immunity without active state supervision. By accepting the legislative designation of an entity as a "political subdivision" without inquiry into its public/private attributes, the Eleventh Circuit has impermissibly sanctioned the conferral of immunity by fiat. In so doing, it conflicts with the approach suggested by this Court and adopted by other circuits. Petitioners therefore respectfully request that their petition for certiorari be granted.

Respectfully submitted,

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v.

DCH REGIONAL HEALTH CARE AUTHORITY, West Alabama General Hospital, Inc., Defendants-Appellants.

No. 92-6880.

United States Court of Appeals,
Eleventh Circuit.

July 19, 1993.

Plaintiffs brought antitrust action to prevent health care authority from completing its proposed acquisition of private health care facility. The United States District Court for the Northern District of Alabama, No. CV92-C-01343-W, U.W. Clemon, J., denied health care authority's motion for summary judgment, and health care authority appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) district court's order was immediately reviewable pursuant to collateral order doctrine; (2) health care authority qualified as "political subdivision of state" for purposes of antitrust immunity; and (3) health care authority was acting as authorized by state in acquiring private health care facility.

Reversed and remanded.

* * * * *

Appeal from the United States District Court for the Northern District of Alabama.

Before KRAVITCH and HATCHETT, Circuit Judges, and ATKINS*, Senior District Judge.

KRAVITCH, Circuit Judge:

James Askew, Ginger Buck and Phillip Mahan (together, "the plaintiffs") brought this antitrust action against DCH Health Care Authority ("DCH") and West Alabama General Hospital, Inc. (now known as AMI West Alabama, Inc.) ("AMI") to prevent DCH from completing its acquisition of AMI. Plaintiffs alleged that through this purchase, DCH would capture "substantial market power in the market for inpatient services by acute care hospitals and become the dominant provider of such hospital services to the five county area comprising the northwest Alabama region."[1] This case requires us to determine the scope of the state action immunity doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985).

I.

In 1982 the Alabama state legislature enacted the Health Care Authorities Act of 1982, Ala.Code § 22-21-310 *et seq.* ("the Act"). The Act confers broad and explicit powers upon "health care authorities" to own, operate and manage health care facilities. In enacting the statute, the legislature aimed to address the needs of indigent and reduced-care patients by providing for new and different financing mechanisms for publicly-owned hospitals and other health care facilities. *See* Ala.Code § 22-21-312.

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

[1] R.1-1 at 3.

DCH was incorporated as a health care authority in 1982 pursuant to resolutions adopted by the governing bodies of Tuscaloosa County, the City of Tuscaloosa and the City of Northport. The Act defines "health care authority" as "[a] public corporation organized, and any public hospital corporation reincorporated, pursuant to the provisions hereof." Ala.Code § 22-21-311(a)(2). DCH's certificate of incorporation adopts all the power and authority provided by the Act.[2] At issue here is DCH's authority to acquire

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[2] Under Code § 22-21-318, DCH is granted various powers of authority:

> (a) In addition to all other powers granted elsewhere in this article, and subject the express provisions of its certificate of incorporation, an authority shall have the following powers, together with all powers incidental thereto or necessary to the discharge thereof in corporate form:
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> . . . .
>
> (5) To acquire, construct, reconstruct, equip, enlarge, expand, alter, repair, improve, maintain, equip, furnish and operate health care facilities at such place or places, within or without the boundaries of its authorizing subdivisions and within or without the state, as it considers necessary or advisable;
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> . . . .
>
> (7) To receive, acquire, take and hold (whether by purchase, gift, transfer, foreclosure, lease, devise, option or otherwise) real and personal property of every description, or an interest therein, and to manage, improve and dispose of the same by any form of legal conveyance or transfer; . . .
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> . . . .
>
> (23) To assume any obligations of any entity that conveys and transfers to the authority any health care facilities or other property, or interest therein, provided that such obligations appertain to the health care facilities, property or interest so conveyed and transferred to the authority;
>
> . . . .
>
> (31) To exercise all powers granted hereunder in such manner as it may determine to be consistent with the purposes of this article, notwithstanding that as a consequence

(Footnote continued on following page)

health care facilities. *See* Ala.Code § 22-21-318(a)(5).[3]

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[2] *continued*

of such exercise of such powers it engages in activities that may be deemed "anticompetitive" within the contemplation of the antitrust laws of the state or of the United States. . . .

Under Code § 22-21-358, which was added the Act in 1990, DCH, as a health care authority, is authorized:

(4) To create, establish, acquire, operate or support subsidiaries and affiliates, either for profit or nonprofit, to assist such authority in fulfilling its purposes;

(5) To create, establish or support nonaffiliated for profit or nonprofit corporations or other lawful business organizations which operate and have as their purpose the furtherance of such authority's purposes; [and]

(6) Without limiting the generality of the preceding subdivisions . . . to accomplish and facilitate the . . . acquisition . . . of any such subsidiary, affiliate, nonaffiliated corporation or other lawful business organization. . . .

The Act also provides health care authorities with the power of eminent domain. Ala.Code § 22-21-319.

[3] "Health care facility" is defined by the Act as:

Generally, any one or more buildings or facilities which serve to promote the public health, either by providing places or facilities for the diagnosis, treatment, care, cure or convalescence of sick, injured, physically disabled or handicapped, mentally ill, retarded or disturbed persons, or for the prevention of sickness and disease, or for the care, treatment and rehabilitation of alcoholics, or for the care of elderly persons, or for research with respect to any of the foregoing, including, without limiting the generality of the foregoing:

a. Public hospitals of all types, public clinics, sanitoria, public health centers and related public health facilities, such as medical or dental facilities, laboratories, out-patient departments, educations facilities, nurses' homes and nurses' training facilities, dormitories or residences for hospital personnel or students . . . ;

. . . .

c. Appurtenant buildings and other facilities:

1. To provide offices for persons engaged in the diagnosis, treatment, care or cure of diseased, sick or injured per-

(Footnote continued on following page)

DCH owns and operates a public hospital in Tuscaloosa, Alabama known as Druid City Hospital; it provides inpatient acute care hospital services to the general public. Before the proposed transaction, AMI was a privately-owned hospital located in the City of Northport. AMI also provided, and continues to provide, inpatient acute care hospital services to the general public.

After filing their initial complaint, plaintiffs sought a Temporary Restraining Order ("TRO") to stop the sale of AMI to DCH.[4] The district court denied plaintiffs' motion, holding that plaintiffs had failed "to carry their burden of irreparable injury . . . and to show a substantial likelihood of success on the merits of their claim that the activities complained of are not immune from the operation of the antitrust laws."[5] After the TRO was denied, DCH and AMI moved to dismiss the case with prejudice or for summary judgment, arguing that, as a matter of law, they were immune from antitrust liability for the alleged conduct. At this point, the district court stayed all discovery except as to the immunity issue. Before arguments were heard on DCH/AMI's motion for summary judgment, plaintiffs filed for leave to amend the complaint to add the City of Northport as a party plaintiff and to in-

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[3] *continued*

> sons, or in preventive medicine, or in the practice of dentistry; . . .
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> . . . .
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> f. Machinery, equipment, furniture and fixtures useful or desirable in the operation of any of the foregoing.

Ala.Code § 22-21-311(a)(13).

[4] At the time this suit was filed, the proposed transaction essentially had been completed, save for the financing by the issuance of municipal bonds.

[5] R.2 at 28.

clude allegations that DCH should not receive immunity because it was acting pursuant to "private interests." After arguments were heard on the motion to dismiss or for summary judgment, plaintiffs moved for an extension to conduct discovery on the immunity issue, having failed to conduct any discovery up to that point. The district court denied the extension. Then, without written order, the district court denied DCH/AMI's motion to dismiss or for summary judgment, simply by stamping the motion "DENIED." DCH/AMI sought, and received, an expedited appeal.[6]

II.

Before reaching the merits of this appeal, we address whether this court properly has jurisdiction under 28 U.S.C. § 1291.[7] Under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), district court orders constitute final decisions and are immediately reviewable if they (1) are effectively unreviewable on appeal after trial; (2) conclusively determine the disputed question; and (3) resolve an important issue com-

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[6] One of the major reasons DCH sought an expedited appeal was because the suit had hampered its ability to issue the bonds necessary to complete the financing; the Municipal Bond Investors Assurance Corporation had declined to insure the bonds. By the time this court heard oral argument in the case, however, DCH had decided to go forward with the bond financing, without insurance, because interest rates are at a twenty-year low.

[7] This section of the Judicial Code reads in part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1291 (1982).

pletely separate from the merits. *Id.* at 546-47, 69 S.Ct. at 1225-26. In *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985), the Supreme Court specifically applied the rule of *Cohen*, known as the collateral order doctrine, to a decision by the district court to deny summary judgment on the grounds of qualified immunity.[8] This court then extended the holding in *Mitchell* to a decision by the district court to deny state action immunity from antitrust liability, reasoning that because *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, "provide[s] '*immunity from suit* rather than a mere defense to liability,' . . . the district court's decision . . . is effectively unreviewable on appeal from a final judgment." *Commuter Transp. Systems, Inc. v. Hillsborough County*, 801 F.2d 1286, 1289 (11th Cir. 1986) (quoting *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815) (emphasis in *Mitchell*).

Plaintiffs contend that the district court did not issue a "final and reviewable" order by stamping "DENIED" on DCH/AMI's motion to dismiss or for summary judgment. This argument is foreclosed by *Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir. 1992), where this court ruled that the district court's denial of summary judgment "without explanation" was sufficient to constitute a final and appealable order. Plaintiffs also argue that the district court "may have concluded that there are fact questions" precluding summary judgment on the issue of immunity.[9]

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[8] The Supreme Court recently affirmed these principles and extended them to other immunity situations. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, ___ U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (holding that district court's decision regarding state's Eleventh Amendment immunity is a final and appealable order).

[9] Pls.Amend.Br. at 11-12.

Commuter Transportation, however, following *Mitchell*, held that the decision to deny summary judgment on an immunity issue, "even if it is based on the existence of potential fact issues[,] . . . conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations." 801 F.2d at 1289. In addition, the *Commuter Transportation* court recognized that questions relating to immunity are " 'conceptually distinct from the merits of the plaintiff's claim.' " *Id.* at 1290 (quoting *Mitchell*, 472 U.S. at 528, 105 S.Ct. at 2816). Therefore, we conclude that the district court's denial of DCH/AMI's motion to dismiss or for summary judgment is a final and appealable order under 28 U.S.C. § 1291 and *Cohen*.

III.

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, the Supreme Court held that the Sherman Act does not apply to the anticompetitive conduct of states acting as sovereigns. "Rather it ruled that the Sherman Act was intended to prohibit *private* restraints on trade, and it refused to infer an intent to 'nullify a state's control over its officers and agents' in activities directed by the legislature." *Town of Hallie*, 471 U.S. at 38, 105 S.Ct. at 1716 (quoting *Parker*, 317 U.S. at 351, 63 S.Ct. at 313) (emphasis in original). "Although 'cities are not themselves sovereign,' states may sanction cities' anticompetitive conduct, enshrouding the cities within the protective cloak of *Parker* immunity." *McCallum v. City of Athens*, 976 F.2d 649, 652 (11th Cir. 1992) (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412-13, 98 S.Ct. 1123, 1136-37, 55 L.Ed.2d 364 (1978)).

A.

Ordinarily, when a local governmental entity seeks immunity from antitrust liability, it must show that it is a political subdivision of the state and that the challenged conduct is authorized under a "clearly articulated and affirmatively expressed" policy of the state. *Town of Hallie*, 471 U.S. at 41-47, 105 S.Ct. at 1717-20. Plaintiffs argue, however, that because DCH is not a city, town or village, the question of its immunity from antitrust liability should be analyzed under the two-prong test used to assess immunity for private parties acting pursuant to state regulation. This inquiry, developed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), requires regulated private parties seeking antitrust immunity to show that (1) there is a "clearly articulated and affirmatively expressed" policy authorizing the challenged conduct; and (2) there is active state supervision of the private parties as part of the regulatory scheme. *Id.* at 105-06, 100 S.Ct. at 943.

Town of Hallie, as well as the case upon which it relied, *Lafayette*, 435 U.S. 389, 98 S.Ct. 1123, involved challenges to alleged anticompetitive conduct by municipalities. In holding "that the active state supervision requirement should not be imposed in cases in which the actor is a municipality," the *Town of Hallie* Court reasoned that "[w]here the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement." 471 U.S. at 46-47, 105 S.Ct. at 1720 (emphasis in original). Thus, as long as the municipality can prove that it is acting pursuant to state policy, "there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." *Id.* at 47, 105 S.Ct. at 1720.

Plaintiffs contend, however, that the *Town of Hallie* Court recognized a distinction between municipalities and other political subdivisions of the state in that

> municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some states are subject to "sunshine" laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties.

Id. at 45 n. 9, 105 S.Ct. at 1719 n. 9. This distinction, plaintiffs assert, is relevant here because DCH, as a health care authority, is not subject to those safeguards that ensure that a municipality is acting in the public interest. For example, DCH is not subject to Alabama open meetings or ethics law nor are its officers publicly elected.

Despite the language in footnote 9, neither *Town of Hallie* nor any other Supreme Court or Eleventh Circuit case has held that a political subdivision that is not a municipality—i.e. a water authority, a transit authority, a public hospital corporation—is subject to the two-prong test of *Midcal*. In fact, several cases in this circuit have held that such authorities were immune from antitrust liability under the test enunciated in *Town of Hallie*. *See, e.g.*, *Commuter Transportation*, 801 F.2d at 1290 (transit authority); *Golta v. Greater Orlando Aviation Authority*, 761 F.Supp. 778 (M.D.Fla. 1991) (aviation authority); *Central Florida Clinic for Rehabilitation, Inc. v. Citrus County Hosp. Bd.*, 738 F.Supp. 459 (M.D.Fla. 1989), *aff'd w'out op.*, 888 F.2d 1396 (11th Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2207, 109 L.Ed.2d 533 (1990) (hospital corporation); *Sweeney v. Athens Regional Medical Center*, 705 F.Supp. 1556 (M.D.Ga. 1989) (municipal health care

authority); *Griffith v. Health Care Authority of City of Huntsville*, 705 F.Supp. 1489 (N.D.Ala. 1989) (health care authority organized under Alabama statute at issue in this case).[10] Most important, this court previously held that *DCH itself* is a political subdivision under Alabama law, and thus is subject to the "clearly articulated and affirmatively expressed" test of *Town of Hallie*. *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1460-62 (11th Cir. 1991).

The reasoning in *Todorov* is not affected, as plaintiffs contend, by the Supreme Court's recent decision in *Federal Trade Commission v. Ticor Title Ins. Co.*, ___ U.S. ___, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). *Ticor* deals with price fixing by loosely regulated private insurance companies. The issue before the Court was the nature of

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[10] Other circuits have held similarly. *See, e.g., Buckley Construction, Inc. v. Shawnee Civic & Cultural Development Auth.*, 933 F.2d 853 (10th Cir. 1991) (public trust created pursuant to state statute); *Benton, Benton & Benton v. Louisiana Public Facilities Auth.*, 897 F.2d 198 (5th Cir. 1990) (state-created public utilities authority), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1619, 113 L.Ed. 2d 717 (1991); *Consolidated T.V. Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988) (city-created cable television corporation), *cert. denied*, 489 U.S. 1082, 109 S.Ct. 1537, 103 L.Ed. 2d 842 (1989); *Sandcrest Outpatient Services v. Cumberland County Hosp. Systems, Inc.*, 853 F.2d 1139 (4th Cir. 1988) (county hospital corporation); *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir.) (statutorily-created municipal corporation), *cert. denied*, 488 U.S. 965, 109 S.Ct. 489, 102 L.Ed.2d 526 (1988); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987) (state-created port authority); and *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032 (2d Cir. 1986) (statutorily-created development corporation); *but cf., Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558 (10th Cir. 1991) (holding that hospital created as public trust is not a "special function governmental unit" for purposes of the Local Government Act of 1984), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2996, 120 L.Ed.2d 872 (1992).

the state supervision involved. Despite the Court's strong language in *Ticor* that "a State may not confer antitrust immunity on private persons by fiat," *id.* at ____, 112 S.Ct. at 2176, the case simply is not applicable to entities that are political subdivisions of a state. In fact, this court ruled in a case decided after *Ticor* that a political subdivision receives antitrust immunity if it meets the *Town of Hallie* test; no second prong is imposed. *See Bolt v. Halifax Hosp. Medical Center*, 980 F.2d 1381, 1385-87 (11th Cir. 1993).

B.

Even under the *Town of Hallie* test, plaintiffs maintain that DCH is not a political subdivision *for purposes of acquiring a privately-owned hospital.* In acquiring other health care facilities, plaintiffs contend, DCH is acting like a private party and the state legislature cannot immunize conduct that would be illegal if engaged in by private entities. They make this argument despite the plain language of the Act and this court's ruling in *Todorov*, 921 F.2d at 1460-62, that DCH is a political subdivision for purposes of antitrust immunity. Their argument fails.

As a basis for the power granted to DCH, as a health care authority, the Act specifically states:

> [It is] an expression of the public policy of the state with respect to the displacement of competition in the field of health care, that each authority, when exercising its powers hereunder with respect to the operation and management of health care facilities, acts as an agency or instrumentality of its authorizing subdivisions and as a political subdivision of the state.

Ala.Code § 22-21-318(c)(2). Plaintiffs contend that acquiring another hospital was not contemplated by the phrase

"operation and management of health care facilities" and point to other sections of the Act that distinguish "acquiring" from "operating." For example, Alababa Code section 22-21-318(a)(5) states, in part, that health care authorities shall have the power:

> [t]o acquire, construct, reconstruct, equip, enlarge, expand, alter, repair, improve, maintain, equip, furnish and operate health care facilities at such place or places, within or without the boundaries of its authorizing subdivisions and within and without the state, as it considers necessary or advisable.

See also supra note 2. If the Alabama legislature wanted to immunize health care authorities from antitrust liability for the acquisition of other hospitals, plaintiffs assert, it could have said so explicitly, as it did in other provisions of the Act.

The *Todorov* court, however, in holding that DCH is a political subdivision for purposes of antitrust immunity, did not make such distinctions. The court wrote:

> It is apparent from this Act [Ala.Code § 22-21-210 *et seq.*] that the Alabama legislature made any hospital organized pursuant to the Act a local government entity, labeling such a hospital "a political subdivision of the state." DCH, as a hospital so organized, clearly qualifies as a local government entity. Thus, DCH will be immunized from antitrust liability if, pursuant to the dictate of *Town of Hallie*, it was acting as authorized by the state when it engaged in the allegedly anticompetitive behavior.

921 F.2d at 1461. In addition, in a case affirmed by this court, the district court in *Central Florida Clinic* ruled that a health care authority's power to "operate hospitals in the county" included the power to acquire a privately-owned health care facility. 738 F.Supp. at 462, *aff'd w'out op.*, 888 F.2d 1396 (11th Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2207, 109 L.Ed.2d 533 (1990).

Furthermore, this court's recent decision in *McCallum*, 976 F.2d 649, forecloses plaintiffs' argument that DCH is not immunized from antitrust liability when it is "acting like a private party." In *McCallum*, the court affirmed the dismissal of plaintiff's Sherman Act claims against the City of Athens arising from Athens' operation of a for-profit waterworks. The court rejected plaintiff's argument that "the proprietary nature of Athens' waterworks" precluded state action immunity. Citing to the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed. 2d 1016 (1985), the *McCallum* panel held that there is no meaningful distinction for purposes of immunity between "governmental" and "proprietary" activities. 976 F.2d at 653 n. 7.

McCallum also rejected arguments, similar to those made by plaintiffs here, that the legislature of a state cannot "create immunity by fiat." The court wrote:

> Of course, "the State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful." *Town of Hallie*, 471 U.S. at 39, 105 S.Ct. at 1716 (citing *Parker*, 317 U.S. at 351, 63 S. Ct. at 313). Yet, [the state] does not seek to declare lawful conduct that is not. Rather, [the state] expresses its state policy favoring municipal immunity from liability. Immunity does not alter the legal character of the immune act; it simply disallows recovery.

976 F.2d at 655 n. 9. *See also Columbia v. Omni Outdoor Advertising*, ___ U.S. ___, 111 S.Ct. 1344, 1349-53, 113 L.Ed.2d 382 (1991) (holding that a governmental entity does not lose its state action immunity when its actions benefit private parties nor when its actions were motivated by proprietary interests); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 804 F.Supp. 700, 710 (E.D.Pa. 1992) (same).

C.

Having shown itself to be a political subdivision for purposes of antitrust immunity, under *Town of Hallie* DCH now must prove that "it was acting as authorized by the state when it engaged in the allegedly anticompetitive behavior." *Todorov*, 921 F.2d at 1461. This authorization must be pursuant to "clearly expressed state policy." *Id.* at 1460. The dispute between the parties here is whether the Act authorizes DCH to acquire AMI, which is a privately-owned, public health care facility.

As described above, *see supra* note 2, the Act grants DCH broad powers (1) "[t]o acquire . . . and operate health care facilities," Ala.Code § 22-21-318(a)(5); (2) "[t]o receive, acquire, take and hold . . . real and personal property of every description, . . . and to manage, improve and dispose of the same," Ala.Code § 22-21-318(a)(7); and (3) "[t]o . . . acquire, operate or support subsidiaries and affiliates, either for profit or nonprofit, to assist such authority in fulfilling its purposes." Ala.Code § 22-21-358(4). The Act also grants DCH the power of eminent domain, which by definition can only be used to acquire *privately-owned* property. Ala.Code § 22-21-319. In addition, in describing the legislature's purpose in creating health care authorities, the Act states:

> It is therefore the intent of the legislature by the passage of this article to promote the public health of the people of this state . . . by authorizing the several counties and municipalities in the state effectively to form public corporations whose corporate purpose shall be to *acquire*, own and operate health care facilities. . . .

Ala.Code § 22-21-312 (emphasis added). "Health care facility" is broadly defined in the Act, and is specifically not limited to the examples given. *See supra* note 3.

DCH and AMI contend that AMI fits squarely within the definition of "health care facility" in that it is "one or more buildings or facilities which serve[s] to promote the public health." Ala.Code § 22-21-311(a)(13). In addition, AMI, it is argued, meets the first description given by that section in that it is a "public hospital"—that is, not a Veterans Administration hospital, health maintenance organization ("HMO") facility or other facility *not open to the general public.*

Plaintiffs rebut this argument by asserting that "public hospital" as described in section 22-21-311(a)(13) means "publicly-owned" as opposed to "privately-owned." In support of this argument, plaintiffs cite to the section of the Act dealing with legislative findings. There the Act states:

> Publicly-owned (as distinguished from investor-owned and community-nonprofit) hospitals and other health care facilities furnish a substantial part of the indigent and reduced-rate care services furnished to residents of the state by hospitals and other health care facilities generally.

Ala.Code § 22-21-312(1). From this passage, plaintiffs extrapolate that when the legislature stated that "health care facilities" included "public hospitals," it meant "publicly-owned hospitals"—that is, what makes the hospital public is the ownership, not the clientele. Thus, because AMI is a "privately-owned hospital"—despite the fact that it is open to the public—DCH's acquisition of it was outside the boundaries of its authorization.

Plaintiffs' argument is inconsistent with a common sense reading of the statute. The legislature clearly stated that, in its view, publicly-owned hospitals played a very significant role in providing health care to the poor. By establishing public health care authorities, it sought to enhance the amount and quality of service for Alabama's poor. If

DCH could only purchase other publicly-owned hospitals, the overall number of publicly-owned failities would not increase and service to the disadvantaged would remain the same. To the contrary, by purchasing AMI, DCH has increased the number of publicly-owned hospitals in the Tuscaloosa area, has expanded its ability to serve indigent care needs in the region, and has enhanced its ability to provide indigent and reduced-rate care at its existing facilities. This is entirely consistent with what the Alabama legislature authorized DCH to do.

D.

The final step under *Town of Hallie* is for DCH to show that the anticompetitive nature of its actions was anticipated. *Town of Hallie*, 471 U.S. at 41-45, 105 S.Ct. at 1717-19; *McCallum*, 976 F.2d at 651-52. This standard is easily met here. The Act specifically states in section 22-21-318(a)(31) that a health care authority is to carry out its functions to the full extent of its powers,

> notwithstanding that as a consequence of such exercise of such powers[,] it engages in activities that may be deemed "anticompetitive" within the contemplation of the antitrust laws of the State or of the United States.

See also Ala.Code § 22-21-318(c).

This explicit recognition of the potential anticompetitive results goes well beyond what is required for a political subdivision to show in order to gain state action immunity. In *Town of Hallie* itself, the legislature did not specifically include language anticipating—and condoning—anticompetitive conduct. Yet, the Supreme Court said that the statute at issue indicated that the legislature had foreseen that such conduct was the inevitable result of the city

exercising the power authorized under the law. In addition, the Court cautioned against overly intrusive investigations into the legislative intent, "because it would embroil the federal courts in the unnecessary interpretation of state statutes." *Town of Hallie*, 471 U.S. at 44 n. 7, 105 S.Ct. at 1719 n. 7.

IV.

For the foregoing reasons, we hold that DCH is immune from antitrust liability for its conduct relating to the purchase of AMI. Accordingly, we REVERSE the decision of the district court and REMAND the case to the district court for proceedings consistent with this opinion.

[Filed June 12, 1992]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

JAMES D. ASKEW, GINGER BUCK and PHILLIP MAHAN,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO.
	)	CV 92-C-1343-W
THE DCH HEALTH CARE AUTHORITY and WEST ALABAMA GENERAL HOSPITAL, INC.,	)	
Defendants.	)	

MOTION TO DISMISS WITH PREJUDICE, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT WITH REQUEST FOR EXPEDITED HEARING

Defendant The DCH Health Care Authority hereby moves the Court to enter an Order pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure dismissing this action with prejudice for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted or, in the alternative, granting summary judgment in favor of the defendants. Defendant West Alabama General Hospital, Inc. has authorized this defendant to state to the Court that it joins in this motion. As grounds for this motion, defendants show unto the Court as follows:

* * * * *

[Balance of Motion omitted in printing.]

On September 30, 1992, without written order, the United States District Court for the Northern District of Alabama, Western Division, denied Defendants' Motion to Dismiss with Prejudice, or in the Alternative for Summary Judgment with Request for Expedited Hearing, by stamping the first page of the Motion as follows:

"DENIED

U. W. Clemon 9/30/92

Judge Date"

Alabama Health Care Authorities Statute

ARTICLE 11.

HEALTH CARE AUTHORITIES.

§ 22-21-310. Short title.

This article shall be known and may be cited as "The Health Care Authorities Act of 1982." (Acts 1982, No. 82-418, p. 629, § 1.)

§ 22-21-311. Definitions.

(a) The following words and phrases used in this article, and others evidently intended as the equivalent thereof, shall, in the absence of clear implication herein otherwise, be given the following respective interpretations herein:

(1) APPLICANT. A natural person who files a written application with the governing body of a county or municipality, or two or more thereof, in accordance with the provisions of section 22-21-313.

(2) AUTHORITY. A public corporation organized, and any public hospital corporation reincorporated, pursuant to the provisions hereof.

(3) AUTHORIZING RESOLUTION. The resolution adopted by the governing body of an authorizing subdivision, in accordance with the provisions of section 22-21-313 or section 22-21-341, that authorizes the incorporation of an authority or the reincorporation of a public hospital corporation.

(4) AUTHORIZING SUBDIVISION. Each county and municipality with the governing body of which an application for the incorporation of an authority hereunder or for the reincorporation of a public hospital corporation hereunder is filed.

(5) BOARD. The board of directors of an authority.

(6) CODE. The Code of Alabama 1975 and all amendments thereto and, with respect to any particular title, chapter, article, division, section or other portion thereof, any act of the legislature or other code preceding such portion of the code or subsequently replacing the same.

(7) COUNTY. Any county in the state.

(8) COUPON. Any interest coupon evidencing an installment of interest payable with respect to a security.

(9) DIRECTOR. A member of a board.

(10) FEDERAL SECURITIES. Debt securities that are direct obligations of the United States of America for the payment of which the full faith and credit of the United States of America is pledged, or debt securities issued by a person controlled or supervised by and acting as an instrumentality of the United States of America, the payment of the principal of and interest on which is fully and unconditionally guaranteed by the United States of America.

(11) FISCAL YEAR. A fiscal year of the authorizing subdivision.

(12) GOVERNING BODY. With respect to a county, its county commission or other like governing body, and with respect to a municipality, its city or town council, board of commissioners or other like governing body.

(13) HEALTH CARE FACILITIES. Generally, any one or more buildings or facilities which serve to promote the public health, either by providing places or facilities for the diagnosis, treatment, care, cure or convalescence of sick, injured, physically disabled or handicapped, mentally ill, retarded or disturbed persons, or for the prevention of sickness and disease, or for the care, treatment and rehabilitation of alcoholics, or for the care of elderly persons, or for research with respect

to any of the foregoing, including, without limiting the generality of the foregoing:

a. Public hospitals of all types, public clinics, sanitoria, public health centers and related public health facilities, such as medical or dental facilities, laboratories, out-patient departments, educational facilities, nurses' homes and nurses' training facilities, dormitories or residences for hospital personnel or students, other employee-related facilities, central service facilities operated in connection with public hospitals and other facilities (such as, for example, gift and flower shops, cafe and cafeteria facilities and the like) ancillary to public hospitals;

b. Retirement homes, nursing homes, convalescent homes, apartment buildings, dormitory or domiciliary facilities, residences or special care facilities for the housing and care of elderly persons or other persons requiring special care;

c. Appurtenant buildings and other facilities:

1. To provide offices for persons engaged in the diagnosis, treatment, care or cure of diseased, sick or injured persons, or in preventive medicine, or in the practice of dentistry; or

2. To house or service equipment used for the diagnosis, treatment, care or cure of diseased, sick or injured persons, or in preventive medicine, or in the practice of dentistry, or the records of such diagnosis, treatment, care, cure or practice or research with respect to any of the foregoing;

d. Parking areas, parking decks, facilities, buildings and structures appurtenant to any of the foregoing;

e. Ambulance, helicopter and other similar facilities and services for the transportation of sick or injured persons; and

f. Machinery, equipment, furniture and fixtures useful or desirable in the operation of any of the foregoing.

(14) HOSPITAL TAX. Any tax which may be levied for the benefit of an authority or any health care facilities owned or operated by it or the proceeds of which may have been appropriated, allocated or apportioned to such authority, or to or for the benefit of any such health care facilities, by the legislature or by the governing body of a county or municipality.

(15) INCORPORATORS. The natural persons forming an authority pursuant to the provisions of this article.

(16) INDENTURE. A mortgage, mortgage indenture, mortgage and trust indenture or trust indenture executed by an authority as security for any of its securities.

(17) LEGISLATURE. The legislature of the state.

(18) MUNICIPALITY. An incorporated city or town of the state.

(19) PRINCIPAL OFFICE. The place at which the certificate of incorporation of an authority and amendments thereto, the bylaws and the minutes of the proceedings of the board are kept.

(20) PUBLIC HOSPITAL CORPORATION. Any public authority, public corporation or public association or entity organized on a local or regional basis by or with the consent of any county or municipality (or any two or more thereof) and having the power to own or operate any health care facilities, including (without limitation) any public corporation or authority heretofore or hereafter organized under the provisions of article 3, division 1 of article 4, article 5, or article 6 of this chapter, section 22-21-5, or chapter 95 of Title 11, but excluding the state, any state institution of higher learning owning or operating health care facilities or any

other state (as distinguished from local or regional) agency owning or operating health care facilities.

(21) SECURITIES. Bonds, notes, warrants, certificates of indebtedness or other evidences of indebtedness, including (without limiting the generality of the foregoing) notes issued in anticipation of the sale of any of the foregoing.

(22) STATE. The state of Alabama.

(b) The terms "herein," "hereby," "hereunder," "hereof," and other equivalent words refer to this article as an entirety and not solely to the particular section or portion hereof in which any such word is used. The definitions set forth herein shall be deemed applicable whether the words defined are used in the singular or plural. Whenever used herein any pronoun or pronouns shall be deemed to include both singular and plural and to cover all genders. (Acts 1982, No. 82-418, p. 629, § 2.)

§ 22-21-312. Legislative findings and intent.

The legislature hereby finds and declares:

(1) That publicly-owned (as distinguished from investor-owned and community-nonprofit) hospitals and other health care facilities furnish a substantial part of the indigent and reduced-rate care and other health care services furnished to residents of the state by hospitals and other health care facilities generally;

(2) That as a result of current significant fiscal and budgetary limitations or restrictions, the state and the various counties and municipalities therein are no longer able to provide, from taxes and other general fund moneys, all the revenues and funds necessary to operate such publicly-owned hospitals and other health care facilities adequately and efficiently; and

(3) That to enable such publicly-owned hospitals and other health care facilities to continue to operate ade-

quately and efficiently, it is necessary that the entities and agencies operating them have significantly greater powers with respect to health care facilities than now vested in various public hospital or health-care authorities and corporations and the ability to provide a corporate structure somewhat more flexible than those now provided for in existing laws relating to the public hospital and health-care authorities.

It is therefore the intent of the legislature by the passage of this article to promote the public health of the people of the state (1) by authorizing the several counties and municipalities in the state effectively to form public corporations whose corporate purpose shall be to acquire, own and operate health care facilities, and (2) by permitting, with the consent of the counties or municipalities (or both) authorizing their formation, existing public hospital corporations to reincorporate hereunder. To that end, this article invests each public corporation so organized or reincorporated hereunder with all powers that may be necessary to enable it to accomplish its corporate purposes and shall be liberally construed in conformity with said intent. (Acts 1982, No. 82-418, p. 629, § 3.)

§ 22-21-313. Application for incorporation of authority; authorizing resolution.

(a) In order to incorporate an authority, any number of natural persons, not less than three, shall first file a written application with the governing body of any county or municipality, or any two or more thereof, which application shall:

(1) Recite the name of each county and municipality with the governing body of which such application is being filed;

(2) Contain a statement that the applicants propose to incorporate an authority pursuant to the provisions of this article;

(3) State that each of the applicants is a duly qualified elector of the authorizing subdivision (or, if there is more than one, at least one thereof); and

(4) Request that the governing body of such authorizing subdivision adopt a resolution declaring that it is wise, expedient and necessary that the proposed authority be formed, approving its certification of incorporation and authoring the applicants to proceed to form the proposed authority by filing for record a certificate of incorporation in accordance with the provisions of section 22-21-314.

Every such application shall be accompanied by the form of certificate of incorporation of the proposed authority and by such other supporting documents as the applicants may consider appropriate.

(b) As promptly as may be practicable after the filing of the aforesaid application with it in accordance with the preceding provisions of this section, the governing body of each authorizing subdivision with which the application was filed shall review the contents of the application and the accompanying form of certificate of incorporation and shall adopt a resolution either

(1) Denying the application; or

(2) Declaring that it is wise, expedient and necessary that the proposed authority be formed, approving the form of its certificate of incorporation and authorizing the applicants to proceed to form the proposed authority by filing for record such a certificate of incorporation in accordance with the provisions of section 22-21-314.

While it shall not be necessary that any such resolution be published in any newspaper or posted, the governing body of each authorizing subdivision with which the application is filed shall cause a copy of the application (and accompanying documents) to be included in the aforesaid

resolution or otherwise spread upon or made a part of the minutes of the meeting thereof at which final action thereon is taken. Except as otherwise provided in section 22-21-341, no authority shall be formed hereunder unless the application required by this section shall be made and unless an authorizing resolution for which provisions is made in this section shall be adopted by each authorizing subdivision. (Acts 1982, No. 82-418, p. 629, § 4.)

§ 22-21-314. Certificate of incorporation—Filing; form and contents; recordation.

(a) Within 40 days following the adoption of the authorizing resolution (or, if there is more than one, the last adopted thereof), the applicants shall proceed to incorporate an authority by filing for record, in the office of the judge of probate of the county in which the principal office of the authority is to be located, a certificate of incorporation which shall comply in form and substance with the requirements of this section, shall be in the form and executed in the manner herein provided and shall also be in the form theretofore approved by the governing body of each authorizing subdivision.

(b) In addition to any other provisions required by this article to be included therein, the certificate of incorporation of an authority shall state:

(1) The names of the incorporators, together with the address of the residence of each thereof, and that each of them is a duly qualified elector of the authorizing subdivision (or, if there is more than one, at least one thereof);

(2) The name of the authority, which may be a name indicating in a general way the area proposed to be served by the authority and shall include the words "Health Care Authority" (e.g., "The _____ Health

Care Authority," or "The Health Care Authority of _____," the blank space to be filled in with the name of one or more of the authorizing subdivisions or other geographically descriptive word or words, such descriptive word or words not, however, to preclude the authority from locating health care facilities or otherwise exercising its powers in other geographical areas), unless the secretary of state shall determine that such name is identical to the name of another corporation organized under the laws of the state or so nearly similar thereto as to lead to confusion and uncertainty, in which case the incorporators may insert additional identifying words so as to eliminate said duplication or similarity or adopt some other similar name that is available;

(3) The period for the duration of the authority (if the duration is to be perpetual, subject to the provisions of section 22-21-339, that fact shall be stated);

(4) The name of each authorizing subdivision, together with the date on which the governing body thereof adopted an authorizing resolution;

(5) The location of the principal office of the authority, which shall be within the boundaries of the authorizing subdivision (or, if more than one, at least one thereof);

(6) That the authority is organized pursuant to the provisions of this article;

(7) If the exercise by the authority of any of its powers hereunder is to be in any way prohibited, limited or conditioned, a statement of the terms of such prohibition, limitation or condition;

(8) If the authority is to have the extraordinary power set out in section 22-21-319, a statement to that effect;

(9) The number of directors, which shall be an odd number not less than three, the duration of their re-

spective terms of office (which shall not be in excess of six years), and (subject to the provisions of section 22-21-316) the manner of their election or appointment;

(10) Any provisions, not inconsistent with section 22-21-339, relating to the vesting of title to its assets and properties upon its dissolution; and

(11) Any other matters relating to the authority that the incorporators may choose to insert and that are not inconsistent with this article or with the laws of the state.

(c) The certificate of incorporation shall be signed and acknowledged by each of the incorporators before an officer authorized by the laws of the state to take acknowledgements to deeds.

(d) When the certificate of incorporation is filed for record, there shall be attached to it:

(1) A certified copy of each authorizing resolution; and

(2) A certificate by the secretary of state that the name proposed for the authority is not identical to that of any other corporation organized under the laws of the state or so nearly similar thereto as to lead to confusion and uncertainty.

(e) Upon the filing for record of the certificate of incorporation and the documents required by subsection (d) of this section to be attached thereto, the authority shall come into existence and shall constitute a public corporation under the name set forth in its certificate of incorporation. The said judge of probate shall thereupon record the certificate of incorporation in an appropriate book in his office. (Acts 1982, No. 82-418, p. 629, § 5.)

§ 22-21-315. Same — Amendment; application; approving resolution; filing and recordation of certificate.

(a) The certificate of incorporation of any authority incorporated under the provisions of this article, as well as that of any public hospital corporation reincorporated hereunder, may at any time and from time to time be amended, but only in the manner provided in this section. The board shall first adopt a resolution proposing an amendment to the certificate of incorporation of the authority, which amendment shall be set forth in full in the said resolution and which may include any matters that might have been included in an original certificate of incorporation hereunder.

(b) After the adoption by the board of a resolution proposing an amendment to the certificate of incorporation, the chairman and the secretary of the authority shall sign and file, with the governing body of each authorizing subdivision, a written application in the name and on behalf of the authority, under its seal, requesting such governing body to adopt a resolution approving the proposed amendment, and accompanied by a certified copy of the said resolution adopted by the board proposing the amendment to the certificate of incorporation, together with such documents in support of the application as the chairman may consider appropriate. As promptly as may be particable after the filing of the application with the governing body of an authorizing subdivision as aforesaid, such governing body shall review the application and shall adopt a resolution either denying the application or approving and authorizing the proposed amendment. While it shall not be necessary that any such resolution be published in any newspaper or posted, the governing body of each authorizing subdivision with which any such application is filed

shall cause a copy of the application and all accompanying documents to be included in the aforesaid resolution or otherwise spread upon or made a part of the minutes of the meeting of such governing body at which final action upon such application is taken. The certificate of incorporation of an authority may be amended only after the filing of such an application therefor and the adoption by the governing body of each authorizing subdivision of an approving resolution.

(c) Within 40 days following the adoption of a resolution approving the proposed amendment by the governing body of the authorizing subdivision (or, if there is more than one, the last adopted of such approving resolutions), the chairman and the secretary of the authority shall sign and file for record in the office of the judge of probate of the county in which the certificate of incorporation of the authority was filed a certificate in the name and on behalf of the authority, under its seal, reciting the adoption of said respective resolutions by the board and by the governing body of each authorizing subdivision and setting forth the proposed amendment. The said judge of probate shall thereupon record such certificate in an appropriate book in his office. When such certificate has been so filed and recorded, such amendment shall become effective, and the certificate of incorporation shall thereupon be amended to the extent provided in such amendment. (Acts 1982, No. 82-418, p. 629, § 6.)

§ 22-21-316. Board of directors; qualifications; election or appointment; terms; vacancies; reimbursement for expenses; quorum; regular, special and called meetings; waiver of notice; record of proceedings; use as evidence; removal from office.

(a) Each authority shall have a board of directors composed of the number of directors provided in the certificate of incorporation, as most recently amended. Unless provided to the contrary in its certificate of incorporation, all powers of the authority shall be exercised, and the authority shall be governed, by the board or pursuant to its authorization. Subject to the provisions of subdivision (9) of subsection (b) of section 22-21-314, the board shall consist of directors having such qualifications, being elected or appointed by such person or persons (including, without limitation, the board itself, the governing body or bodies of one or more authorizing subdivisions or other counties and municipalities, and other entities or organizations) and in such manner, and serving for such terms of office, all as shall be specified in the certificate of incorporation of the authority; provided however, that no fewer than a majority of the directors shall be elected by the governing body or bodies of one or more of the authorizing subdivisions and the certificate of incorporation of each authority must contain provisions having this effect.

(b) If, at the expiration of any term of office of any director, a successor thereto shall not have been elected or appointed, then the director whose term of office shall have expired shall continue to hold office until his successor shall be so elected or appointed. It at any time there should be a vacancy on the board, whether by death, registration, incapacity, disqualification or otherwise, a suc-

cessor director to serve for the unexpired term applicable to such vacancy shall be elected or appointed by the person or persons who elected or appointed the predecessor director. Each election or appointment of a director, whether for a full term or to complete an unexpired term, shall be made not earlier than 30 days prior to the date on which such director is to take office as such. Any director, irrespective of by whom elected or appointed, shall be eligible for reelection or reappointment.

(c) Each director shall serve as such without compensation but shall be reimbursed for expenses actually incurred by him in and about the performance of his duties. A majority of the directors shall constitute a quorum for the transaction of business, but any meeting of the board may be adjourned from time to time by a majority of the directors present or may be so adjourned by a single director if such director is the only director present at such meeting. No vacancy in the membership of the board shall impair the right of a quorum to exercise all the powers and perform all the duties of the board. The board shall hold regular meetings at such times as may be provided in the bylaws of the authority, may hold other meetings at any time from time to time upon such notice as may be required by the bylaws of the authority, and must upon call of the chairman of the authority or a majority of the total number of directors, hold a special meeting, none of which meetings shall be subject to the provisions of section 13A-14-2 or other similar law. Whenever any notice is required by the bylaws of the authority to be given of any meeting of the board, a waiver thereof in writing, signed (whether before or after such meeting) by the person or persons entitled to such notice, shall be the equivalent to the giving of such notice. Any matter on which the board is authorized to act may be acted upon at any regular, special or called meeting. At the request

of any director, the vote on any question before the board shall be taken by yeas and nays and entered upon the record. All resolutions adopted by the board shall constitute actions of the authority, and all proceedings of the board shall be reduced to writing and signed by the secretary of the authority and shall be recorded in a well-bound book. Copies of such proceedings, when certified by the secretary of the authority, under the seal of the authority, shall be received in all courts as prima facie evidence of the matters and things therein certified.

(d) Any director may be impeached and removed from office in the same manner and on the same grounds provided in section 175 of the Constitution of Alabama of 1901 and the general laws of the state for impeachment and removal of the officers mentioned in said section 175. (Acts 1982, No. 82-418, p. 629, § 7.)

§ 22-21-317. Officers; election; terms; duties.

The officers of an authority shall consist of a chairman, a vice-chairman, a secretary, a treasurer and such other officers as the board shall deem necessary or desirable. The chairman and the vice-chairman of the authority shall be elected by the board from its membership but neither the secretary, the treasurer nor any of the other officers of the authority need be a director. The offices of secretary and treasurer may, but need not be, held by the same person. The chairman and the vice-chairman of the authority shall be elected by the board for terms of not exceeding three years each, and the secretary, the treasurer and the other officers of the authority shall be elected by the board for such terms as it deems advisable. The duties of the chairman, vice-chairman, secretary and treasurer shall be such as are customarily performed by such officers and as may be prescribed by the board. The duties of any other officers of the authority shall be such

as are from time to time prescribed by the Board. (Acts 1982, No. 82-418, p. 629 § 8.)

§ 22-21-318. Powers of authority.

(a) In addition to all other powers granted elsewhere in this article, and subject to the express provisions of its certificate of incorporation, an authority shall have the following powers, together with all powers incidental thereto or necessary to the discharge thereof in corporate form:

(1) To have succession by its corporate name for the duration of time, which may be in perpetuity, specified in its certificate of incorporation or until dissolved as provided in section 22-21-339;

(2) To sue and be sued in its own name in civil suits and actions, and to defend suits and actions against it, including suits and actions ex delicto and ex contractu, subject, however, to the provisions of chapter 93 of Title 11, which chapter is hereby made applicable to the authority;

(3) To adopt and make use of a corporate seal and to alter the same at pleasure;

(4) To adopt, alter, amend and repeal bylaws, regulations and rules, not inconsistent with the provisions of this article or its certificate of incorporation, for the regulation and conduct of its affairs and business;

(5) To acquire, construct, reconstruct, equip, enlarge, expand, alter, repair, improve, maintain, equip, furnish and operate health care facilities at such place or places, within and without the boundaries of its authorizing subdivisions and within and without the state, as it considers necessary or advisable;

(6) To lease or otherwise make available any health care facilities or other of its properties and assets to such persons, firms, partnerships, associations or corporations and on such terms as the board deems to be

appropriate, to charge and collect rent or other fees or charges therefor and to terminate any such lease or other agreement upon the failure of the lessee or other party thereto to comply with any of its obligations thereunder;

(7) To receive, acquire, take and hold (whether by purchase, gift, transfer, foreclosure, lease, devise, option or otherwise) real and personal property of every description, or any interest therein, and to manage, improve and dispose of the same by any form of legal conveyance or transfer; provided however, that the authority shall not, without the prior approval of the governing body of each authorizing subdivision, have the power to dispose of (i) substantially all its assets, or (ii) any health care facilities the disposition of which would materially and significantly reduce or impair the level of hospital or health care services rendered by the authority; and provided further, that the foregoing proviso shall not be construed to require the prior approval of any such governing body for the mortgage or pledge of all or substantially all its assets or of any of its health care facilities, for the foreclosure of any such mortgage or pledge or for any sale or other disposition thereunder;

(8) To mortgage, pledge or otherwise convey its property and its revenues from any source;

(9) To borrow money in order to provide funds for any lawful corporate function, use or purpose and, in evidence of such borrowing, to sell and issue interest-bearing securities in the manner provided and subject to the limitations set forth hereinafter;

(10) To pledge for payment of any of its securities any revenues (including proceeds from any hospital tax to which it may be entitled) and to mortgage or pledge any or all of its health care facilities or other assets

or properties or any part or parts thereof, whether then owned or thereafter acquired, as security for the payment of the principal of and the interest and premium, if any, on any securities so issued and any agreements made in connection therewith;

(11) To provide instruction and training for, and to contract for the instruction and training of, nurses, technicians and other technical, professional and paramedical personnel;

(12) To select and appoint medical and dental staff members and others licensed to practice the healing arts and to delineate and define the privileges granted each such individual;

(13) To affiliate with, and to contract to provide training and clinical experience for students of, other institutions;

(14) To contract for the operation of any department, section, equipment or holdings of the authority, and to enter into agreements with any person, firm or corporation for the management by said person, firm or corporation on behalf of the authority of any of its properties or for the more efficient or economical performance of clerical, accounting, administrative and other functions relating to its health care facilities;

(15) To establish, collect and alter charges for services rendered and supplies furnished by it;

(16) To make all needful or appropriate rules and regulations for the conduct of any health care facilities and other properties owned or operated by it and to alter such rules and regulations;

(17) To provide for such insurance as the business of the authority may require;

(18) To receive and accept from any source aid or contributions in the form of money, property, labor or other things of value, to be held, used and applied to

carry out the purposes of this article, subject to any lawful condition upon which any such aid or contributions may be given or made;

(19) To cooperate with the state board of health and the state department of mental health and to make contracts with either of said agencies respecting the operation of any health care facilities or other properties owned or operated by it, whether as an agent for either or both of said agencies or otherwise;

(20) To enter into contracts with, to accept aid, loans and grants from, to cooperate with and to do any and all things not specifically prohibited by this article or the Constitution of the state that may be necessary in order to avail itself of the aid and cooperation of the United States of America, the state, any county or municipality, or any agency, instrumentality or political subdivision of any of the foregoing in furtherance of the purposes of this article; to give such assurances, contractual or otherwise, to or for the benefit of any of the foregoing as may be required in connection with, or as conditions precedent to the receipt of, any such aid, loan or grant; and to take such action not in violation of law as may be necessary in order to qualify the authority to receive funds appropriated by any of the foregoing;

(21) To give such assurances, contractual or otherwise, and to make such commitments and agreements as may be necessary or desirable to preclude the exercise of any rights of recovery with respect to, or the forfeiture of title to, any of its health care facilities or other property or any health care facilities or other property proposed to be acquired by it;

(22) To make and alter rules and regulations for the treatment of indigent patients;

(23) To assume any obligations of any entity that conveys and transfers to the authority any health care fa-

cilities or other property, or interest therein, provided that such obligations appertain to the health care facilities, property or interest so conveyed and transferred to the authority;

(24) To assume, establish, fund and maintain retirement, pension or other employee benefit plans for its employees;

(25) To appoint, employ, contract with, and provide for the compensation of, such employees and agents, including but not limited to, architects, attorneys, consultants, engineers, accountants, financial experts, fiscal agents and such other advisers, consultants and agents as the business of the authority may require;

(26) To invest, in any trust fund established under and subject to the general laws of the state for investment or self-insurance purposes with investment authority as may be authorized by law for such trusts, any funds of the authority available therefor;

(27) To the extent permitted by its contracts with the holders of its securities, to purchase securities out of any of its funds or moneys available therefor and to hold, cancel or resell such securities;

(28) To make any expenditure of any moneys under its control that would, if the authority were generally subject to state corporate income taxation, be considered an ordinary and necessary expense of the authority within the meaning of section 40-18-35 and applicable regulations thereunder, and without limiting the generality of the foregoing, to expend its moneys for the recruitment of employees and physicians, dentists and other health care professionals for the promotion of employee morale and well-being; provided however, that nothing herein contained shall be construed to permit the authority (i) to increase the compensation of any of its officers or employees on a retroactive basis, (ii)

to pay any extra compensation to any of its officers or employees for services theretofore rendered, (iii) to furnish free or below-cost office space to any nonhospital-based physician, dentist or other health care professional for use in his private practice, or (iv) to guarantee the income of any nonhospital-based physician, dentist or other health care professional in his private practice;

(29) To provide scholarships for students in training for work in the duties peculiar to health care;

(30) To enter into affiliation, cooperation, territorial, management or other similar agreements with other institutions (public or private) for the sharing, division, allocation or exclusive furnishing of services, referral of patients, management of facilities and other similar activities;

(31) To exercise all powers granted hereunder in such manner as it may determine to be consistent with the purposes of this article, notwithstanding that as a consequence of such exercise of such powers it engages in activities that may be deemed "anticompetitive" within the contemplation of the antitrust laws of the state or of the United States; and

(32) To enter into such contracts, agreements, leases and other instruments, and to take such other actions, as may be necessary or convenient to accomplish any purpose for which the authority was organized or to exercise any power expressly granted hereunder.

(b) The legislature hereby declares:

(1) That any expenditure permitted by the provisions of subdivision (28) of the preceding subsection (a) of this section to be made by or on behalf of an authority shall be deemed an expenditure of operating and maintaining public hospitals and public health facilities for a public purpose; and

(2) That no expenditure permitted by the provisions of said subdivision (28) to be made by or on behalf of an

authority shall be considered to be a lending of credit or a granting of public money or thing of value to or in aid of any individual, association or corporation within the meaning of any constitutional or statutory provision. Nothing herein contained shall be construed as prohibiting or rendering unlawful any otherwise lawful expenditure made by or on behalf of an authority, solely because such expenditure is not expressly permitted by the terms of said subdivision (28).

(c) As a basis for the power granted in subdivision (31) of the preceding subsection (a), the legislature hereby:

(1) Recognizes and contemplates that the nature and scope of the powers conferred on authorities hereunder are such as may compel each authority, in the course of exercising its other powers or by virtue of such exercise of such powers, to engage in activities that may be characterized as "anticompetitive" within the contemplation of the antitrust laws of the state or of the United States; and

(2) Determines, as an expression of the public policy of the state with respect to the displacement of competition in the field of health care, that each authority, when exercising its powers hereunder with respect to the operation and management of health care facilities, acts as an agency or instrumentality of its authorizing subdivisions and as a political subdivision of the state.

(d) Nothing herein contained shall be construed as granting to an authority the power to levy any taxes. (Acts 1982, No. 82-418, p. 629, § 9.)

§ 22-21-319. Extraordinary power of authority.

If and only if its certificate of incorporation or an appropriate amendment thereto (both of which must, under the terms of this article, be approved by the governing body of each authorizing subdivision) shall expressly so provide,

an authority shall have, in addition to all other powers granted elsewhere in this article, the same power of eminent domain as is vested by law in any authorizing subdivision, in the same manner and under the same conditions as are provided by law for the exercise of the power of eminent domain by such authorizing subdivision; provided however, that under no circumstances may an authority exercise the power of eminent domain for the purposes of providing office facilities for any physician, dentist or other health care professional primarily for use in his private practice. (Acts 1982, No. 82-418, p. 629, § 10.)

§ 22-21-320. Securities of authority.

Securities of an authority may be executed and delivered by it at any time and from time to time, shall be in such form and denominations and of such tenor and maturity or maturities not exceeding 40 years from their date, shall bear such rate or rates of interest (which may be fixed or which may float or vary based on some index or other standard deemed appropriate by the board), shall be payable and evidenced in such manner, may contain provisions for redemption prior to maturity and may contain other provisions not inconsistent with this article, all as may be provided by the resolution of the board authorizing the same or by the indenture whereunder such securities are authorized to be issued. Each such security having a specified maturity date more than 10 years after its date shall be made subject to redemption at the option of the authority at the end of the tenth year after its date, and on any interest payment date thereafter, under such terms and conditions as may be provided in the resolution authorizing the same or the indenture under which issued. Any borrowing may be effected by the issuance and sale of securities at either public or private sale in such manner, at such price or prices, at such time

or times and on such other terms and conditions as may be determined by the board to be most advantageous to the authority. (Acts 1982, No. 82-418, p. 629, § 11.)

§ 22-21-321. Refunding securities.

(a) An authority may at any time and from time to time sell and issue its refunding securities for the purpose of refunding the principal of and interest on any then outstanding securities of the authority, whether or not such securities shall have matured or be redeemable at the option of the authority at the time of such refunding, and for the payment of any expenses incurred in connection with such refunding and any premium or other sum necessary to be paid to redeem or retire the securities so to be refunded; provided however, that the principal amount of securities that the authority may at any time issue for refunding purposes shall not exceed the sum of the following:

(1) The outstanding principal or face amount of the securities refunded thereby;

(2) The unpaid interest accrued or to accrue thereon to their respective maturities (or, in the event the securities to be refunded, or any part thereof, are to be retired prior to their respective maturities, the interest accrued or to accrue thereon to the date or dates on which they are to be retired);

(3) Any premium or other sum necessary to be paid in order to redeem or retire the securities to be refunded (but only if such securities are in fact to be redeemed or retired prior to their respective maturities); and

(4) The expense estimated to be incurred in connection with such refunding.

The authority may also at any time and from time to time sell and issue its securities for the combined purpose of

so refunding any of its securities and of obtaining funds for any other purpose for which it is authorized by this article to sell and issue securities, in which event the provisions of this article relating to refunding securities shall apply only to those of such securities issued for refunding purposes.

(b) The principal proceeds derived by the authority from the sale of any refunding securities shall be used only for the payment of the principal of and the interest (and premium) on the securities being refunded and for payment of the expenses referred to in the preceding subdivision (4) of subsection (a) of this section; provided, that if in the judgment of the board such is necessary or desirable to effect an advantageous refunding, a portion of said proceeds may be used for payment of principal of and interest on such refunding securities themselves and the remainder of said proceeds for payment of the securities being refunded and of said expenses; and provided further, that any portion of said proceeds that shall at the time not be needed therefor, may be invested in such investments as are specified in section 22-21-332.

(c) Any such refunding may be effected either by sale of refunding securities and the application of the proceeds thereof as provided in subsection (b) of this section, or by exchange of the refunding securities for the securities or coupons to be refunded thereby, or by any combination thereof; provided, that the holders of any securities or coupons so to be refunded shall not be compelled without their consent to surrender their securities or coupons for payment or exchange prior to the date on which they may be paid or redeemed by call of the authority under their respective provisions. All provisions of this article pertaining to securities of the authority that are not inconsistent with the provisions of this section shall, to the extent applicable, also apply to refunding securities issued

by the authority and to securities issued by the authority for both refunding and other purposes. (Acts 1982, No. 82-418, p. 629, § 12.)

§ 22-21-322. Execution of securities.

All securities of an authority shall be signed in the name and behalf of the authority by its chairman or vice chairman, and the seal of the authority shall be affixed thereto and attested by its secretary or an assistant secretary; provided, that a facsimile of the signature of one, but not both, of the officers whose signature will appear on such securities may be imprinted or otherwise reproduced on any thereof in lieu of his manually signing the same; and provided further, that a facsimile of the seal of the authority may be imprinted, or otherwise reproduced, on any such securities in lieu of being manually affixed thereto. Any coupons applicable to any securities of the authority shall be signed either manually by, or with a facsimile of the signature of, the chairman or the vice-chairman of the authority. If after any such securities or coupons shall be so signed, whether manually or by facsimile, any such officer shall, for any reason, vacate his office, the securities and coupons so signed may nevertheless be delivered at any time thereafter as the act and deed of the authority. (Acts 1982, No. 82-418, p. 629, § 13.)

§ 22-21-323. Source of payment; security.

(a) Securities issued by an authority shall not be general obligations of the authority but shall be payable solely out of the revenues from any health care facilities or other properties or assets (including, without limitation, proceeds from such securities, investment income and insurance and condemnation proceeds) owned or operated by it and the proceeds of any hospital tax appropriated, apportioned or allocated to it or for its benefit, or any portion of either thereof, all as may be provided or specified in the resolu-

tion of the board authorizing such securities or the indenture under which issued. The principal of and interest (and premium, if any) on any securities issued by the authority shall be secured by a pledge of the revenues or taxes (or both) out of which the same are payable and may be secured by a trust indenture evidencing such pledge or by a foreclosable mortgage, mortgage indenture or mortgage and trust indenture conveying as security for such securities all or any part of its property.

(b) Any indenture executed on behalf of the authority and any resolution of the board authorizing the issuance of securities may contain such agreements as the board may deem advisable respecting the operation and maintenance of the properties of the authority, the application and use of any revenues (including hospital tax proceeds) out of which any such securities are payable, the rights or duties of the parties to such instrument or the parties for the benefit of whom such instrument is made and the rights and remedies of such parties in the event of default, and may also contain provisions restricting the individual rights of action of the holders of any such securities. Any such indenture may be filed in the office of the judge of probate of any county in which any of the property, real, personal or mixed, subject to the lien thereof is, or is anticipated to be, located, and the lien of such indenture shall, with respect to all personal property and fixtures subject thereto (including after-acquired property) and notwithstanding any contrary provisions of, and without compliance with, the Alabama Uniform Commercial Code (Title 7), be valid and binding against all parties having claims of any kind against the authority, irrespective of whether the parties have actual notice thereof, from the time such indenture is so filed. Any such pledge of any such revenues (including hospital tax proceeds) shall be valid and binding from the time it is made,

and the revenues (including hospital tax proceeds) so pledged and thereafter received by the authority shall immediately become subject to the lien of such pledge without any physical delivery thereof or further act. The lien of such pledge shall, notwithstanding any contrary provisions of the Alabama Uniform Commercial Code (Title 7), and without compliance with the provisions thereof, be valid and binding against all parties having claims of any kind against the authority, irrespective of whether the parties have actual notice thereof, from the time there is filed in the office of the judge of probate of the county in which the principal office of the authority is located a notice stating the date on which the resolution authorizing the issuance of the securities was adopted by the board, the principal amount of the securities issued, a brief description of the revenues (including any hospital tax proceeds) so pledged and a brief description of any property the revenues from which are so pledged. Issuance by any authority of one or more series of securities for one or more purposes shall not preclude it from issuing other securities, but the resolution or indenture whereunder any subsequent securities may be issued shall recognize and protect any prior pledge or mortgage made for the benefit of any prior issue of securities unless in the proceedings authorizing such prior issue the right was reserved to issue subsequent securities on a parity with such prior issue. The trustee under any indenture may be a trust company or bank having trust powers, whether located within or without the state, and may be selected by the board without regard to the provisions of chapter 25 of Title 36. (Acts 1982, No. 82-418, p. 629, § 14.)

§ 22-21-324. Use of proceeds.

(a) The principal proceeds derived from any borrowing made by an authority shall be used solely for the pur-

pose or purposes for which such borrowing was authorized to be made. If any securities are issued for the purpose of financing costs of acquiring, constructing, improving, enlarging and equipping health care facilities, such costs shall be deemed to include the following:

(1) The cost of any land forming a part of such health care facilities;

(2) The cost of the labor, materials and supplies used in any such construction, improvement or enlargement, including architectural and engineering fees and the cost of preparing contract documents advertising for bids;

(3) The purchase price of, and the cost of installing, equipment for such health care facilities;

(4) The cost of landscaping the lands forming a part of such health care facilities and of constructing and installing roads, sidewalks, curbs, gutters, utilities and parking places in connection therewith;

(5) Legal, accounting, publishing, printing, fiscal and recording fees and expenses incurred in connection with the authorization, sale and issuance of the securities issued in connection with such health care facilities; bond discount, commission or other financing charges; fees and expenses of financial advisers and planning and management consultants; the cost of any feasibility studies deemed necessary or advisable in connection with the issuance and sale of such securities; the amount of any debt service reserve that the board deems necessary or advisable to be funded out of the proceeds from the sale of such securities; and such other expenses as shall be necessary or incident to such borrowing;

(6) Interest on such securities for a reasonable period prior to the commencement of the construction and equipment of such health care facilities, or of any improvements or additions being financed (in whole or in part) out of the proceeds from the sale of such securi-

ties, and during the period estimated to be required for such construction and equipment and for a period of not more than two years after the completion of such construction and equipment;

(7) The reimbursement to itself, or to its general fund or any one or more of its other funds, to any authorizing subdivision or other county or municipality, and to any public hospital corporation or other public agency, authority or body, of any funds advanced, to or for the benefit of the authority or any health care facilities owned by it, in anticipation of the issuance of securities by the authority, including the amount of any interest paid or incurred on any borrowings made for the purpose of obtaining funds to advance to or for the benefit of the authority or such health care facilities; and

(8) The amount of such reserves for the payment of debt service on any such securities and for the maintenance, repair, replacement, improvement and enlargement of any of its health care facilities and other properties as the board shall deem advisable.

(b) Any portion of the principal proceeds derived from any such borrowing not needed for any of the purposes for which such borrowing was authorized to be made shall be applied and used:

(1) For retirement of the securities issued in evidence of such borrowing;

(2) For payment of the interest thereon;

(3) For payment into one or more special funds created for payment of principal or interest, or both, or for the creation of reserves for the payment of debt service or for maintenance, repair, replacement, improvement or enlargement; or

(4) For any combination thereof, all as shall be specified in the indenture under which such securities are

issued or in the resolution of the board authorizing any such borrowing. (Acts 1982, No. 82-418, p. 629 § 15.)

§ 22-21-325. Obligations not debt of state, county or municipality.

All agreements and obligations undertaken, and all securities issued, by an authority shall be solely and exclusively an obligation of the authority and shall not create an obligation or debt of the state, any authorizing subdivision or any other county or municipality within the meaning of any constitutional or statutory provision. The faith and credit of the state, any authorizing subdivision or any other county or municipality shall never be pledged for the payment of any securities issued by an authority; nor shall the state, any authorizing subdivision or any other county or municipality be liable in any manner for the payment of the principal of or interest on any securities of an authority or for the performance of any pledge, mortgage, obligation or agreement of any kind whatsoever that may be undertaken by an authority. (Acts 1982, No. 82-418, p. 629, § 16.)

§ 22-21-326. Securities issued under article as legal investments.

Securities issued under the provisions of this article are hereby made legal investments for savings banks and insurance companies organized under the laws of the state. Unless otherwise directed by the court having jurisdiction thereof or the document that is the source of authority, a trustee, executor, administrator, guardian or any one acting in any other fiduciary capacity may, in addition to any other investment powers conferred by law and with the exercise of reasonable business prudence, invest trust funds in securities of an authority. The governing body of any authorizing subdivision (or any county or mu-

nicipality in which any health care facilities of an authority may be situated) is authorized, in its discretion, to invest in securities of such authority any idle or surplus money held in its treasury which is not otherwise earmarked or pledged. (Acts 1982, No. 82-418, p. 629, § 17.)

§ 22-21-327. Securities and coupons as negotiable instruments.

Securities issued by an authority, while not registered, shall be construed to be negotiable instruments although payable solely from a specified or limited source. All coupons applicable to any securities issued by an authority, while the applicable securities are not registered as to both principal and interest, shall likewise be construed to be negotiable instruments although payable solely from a specified or limited source. (Acts 1982, No. 82-418, p. 629, § 18.)

§ 22-21-328. Exemption from usury and interest laws.

An authority shall be exempt from all laws of the state governing usury or prescribing or limiting interest rates, including, but without limitation to, the provisions of chapter 8 of Title 8. (Acts 1982, No. 82-418, p. 629, § 19.)

§ 22-21-329. Notice of issuance of securities; limitation on actions to contest.

Any resolution authorizing any securities under this article may contain a recital that they are issued pursuant to the provisions of this article, which recital shall be conclusive evidence that such securities have been duly authorized pursuant to the provisions of this article, notwithstanding the provisions of any other law now in force or hereafter enacted or amended. Upon the adoption by the board of any resolution providing for the issuance of securities, the authority may, in its discretion, cause to

be published, once a week for two consecutive weeks, in a newspaper then published in the county in which the principal office of the authority is located, or, if there is no such newspaper, then in a daily newspaper published in the state, a notice in substantially the following form, with any appropriate changes, to the extent applicable and with the blanks being properly filled in:

"_____, a public corporation and instrumentality under the laws of the state of Alabama, has authorized the issuance of $_____ principal amount of securities of the said authority to be dated _____, for purposes authorized in Act No. 82-418 enacted at the 1982 Regular Session of the legislature of Alabama. Any action or proceeding questioning the validity of the said securities, or the pledge [and any indenture] to secure the same, must be commenced within 20 days after the first publication of this notice.

[here insert name of the authority]

_____

By _____

Its Chairman"

Any action or proceeding in any court to set aside or question the validity of the proceedings for the issuance of the securities referred to in said notice or to contest the validity of any such securities, the validity of any pledge made therefor or the validity of any indenture with respect thereto must be commenced within 20 days after the first publication of such notice. After the expiration of the said period, no right of action or defense questioning or attacking the validity of the said proceedings, the said securities, any pledge herein authorized, or such indenture shall be asserted, nor shall the validity of the said proceedings, securities, pledge or indenture be open to question in any court on any ground whatsoever except

in an action commenced within said period. (Acts 1982, No. 82-418, p. 629, § 20.)

§ 22-21-330. Lease agreements with authorizing subdivision; terms; renewal options; special pledge as security for payment of rental, etc.; use of vacant space.

(a) Each authority and any authorizing subdivision are hereby respectively authorized to enter into one or more lease agreements with each other whereunder any health care facilities situated within (or within 10 miles of) such authorizing subdivision or any part thereof shall be leased by the authority to such authorizing subdivision, but if and only if such authorizing subdivision is then permitted by law to operate such health care facilities, to issue its bonds, warrants, notes or other securities therefor and to pledge for the benefit of any such securities its full faith and credit. No such lease agreement shall be for a term longer than the then current fiscal year in which it is made. Any such lease agreement may, however, contain a grant to such authorizing subdivision of successive options to renew such lease agreement, on the conditions specified therein, for additional terms, but no such additional term shall be for a period longer than the fiscal year in which such renewal shall be made. Such lease agreement may contain provisions as to the method by which such renewal may be effected.

(b) The obligation on the part of such authorizing subdivision to pay the rental required to be paid and to perform the agreements on its part required to be performed during any fiscal year during which such lease agreement is in effect shall constitute a general obligation of such authorizing subdivision, which is authorized to pledge its full faith and credit for the payment of such rental and the performance of such agreements; provided, that the

rental required to be paid and the agreements required to be performed by such authorizing subdivision under such lease agreement during any fiscal year during which such lease agreement is in effect shall be payable solely out of the current revenues of such authorizing subdivision for such fiscal year.

(c) As additional security for the payment of the rental required to be paid and for performance of the agreements on the part of such authorizing subdivision required to be performed during the first or initial term of any lease agreement made by the authority with such authorizing subdivision, such authorizing subdivision is authorized to pledge specially so much of the following revenues and tax proceeds as may be necessary to pay the rental and to perform the agreements which are required in said lease agreement to be paid and performed during the said initial term:

(1) The revenues that may be received by such authorizing subdivision during the said initial term from the operation of the health care facilities covered by the said lease agreement remaining after the payment of all reasonable expenses during the said initial term for the operation and maintenance of the said health care facilities; and

(2) The proceeds that may be received by such authorizing subdivision during the said initial term from any tax or taxes, the proceeds of which the authorizing subdivision is authorized, in section 11-81-16, to pledge for the benefit of bonds of such authorizing subdivision.

Whenever a lease agreement containing such a special pledge is renewed under its terms for an additional term, such special pledge shall be deemed effective for such additional term without the necessity of a new pledge being made or a new lease agreement being entered into

for that purpose, and the exercise of the option to renew shall be construed as a renewal also of the said special pledge; provided that said special pledge shall be applicable only to the aforesaid pledged revenues that are received by such authorizing subdivision during the fiscal year for which the lease agreement is renewed. Each such special pledge that shall be so effected by renewal of said lease agreement for an additional term shall be deemed to relate to, and to have been made as of, the date on which such lease agreement was made and shall take precedence over any pledge of said pledged revenues which might be made by such authorizing subdivision and over any claim which might arise against the said pledged revenues between the date on which such lease agreement was made and the first day of the additional term for which such lease agreement shall be so renewed. Any pledge of revenues made by such authorizing subdivision as aforesaid under the provisions of any contract made by it subsequent to the date of the lease agreement containing such special pledge shall be subordinate to the special pledge contained in such lease agreement.

(d) In any instance where a lease agreement contains a pledge of any tax proceeds, such authorizing subdivision shall during each fiscal year that such lease agreement shall be in effect:

(1) Levy the tax or taxes so pledged; and

(2) Use so much of the proceeds therefrom as may be necessary to pay the rentals and perform the agreements on the part of such authorizing subdivision which are required in such lease agreement to be paid and performed during such fiscal year.

(e) Any lease agreement may contain such covenants as shall not be inconsistent with this article. The rental required to be paid and the agreements required to be performed by such authorizing subdivision under the pro-

visions of such lease agreement shall never create an indebtedness of such authorizing subdivision within the meaning of any constitutional or statutory limitation or provision. If any space available for rent in any health care facilities which shall have been leased, in whole or in part, to such authorizing subdivision should become vacant after acquisition or construction of such health care facilities by the authority, then until such time as all such vacant space therein shall have been filled or rented, neither such authorizing subdivision nor any officer, department or agency thereof, shall thereafter enter into any rental agreement, or renew any then existing rental agreement, for other space in or about such authorizing subdivision to be used for the same purposes for which such vacant space in such health care facilities is capable of being used. (Acts 1982, No. 82-418, p. 629, § 21.)

§ 22-21-331. Remedies for default in payment of securities or performance of lease agreement.

(a) If there should be any default in the payment of the principal of or interest on any securities issued under this article, then the holder of any such securities and any coupons applicable thereto (subject to any provision of the resolution or indenture under which such securities were issued restricting the individual rights of action of any such holders or vesting such rights exclusively in a trustee), and the trustee under any indenture, or any one or more of them:

(1) May, by mandamus, injunction or other proceedings, compel performance of all duties of the directors and officers of the authority with respect to the use of funds for the payment of such securities and for the performance of the agreements of the authority contained in the proceedings under which they were issued;

(2) Shall be entitled to a judgment against the authority for the principal of and interest on the securities so in default;

(3) May, in the event such securities are secured by a mortgage on or security interest in any physical properties of the authority, foreclose such mortgage or pledge, exercise any powers of sale contained therein or exercise any possessory or other similar rights as are provided for in the resolution or indenture under which such securities were issued;

(4) Regardless of the sufficiency of the security for the securities in default and as a matter of right, shall be entitled to the appointment of a receiver:

a. To make lease agreements respecting any health care facilities or other properties out of whose revenues the securities so in default are payable and fix and collect rents therefor; and

b. To operate, administer and maintain such health care facilities and other properties, with all powers of a receiver in the exercise of any of said functions.

The income derived from any lease agreement made, and any operation of such health care facilities and other properties carried on, by any such receiver shall be expended in accordance with the provisions of the proceedings under which the securities were authorized to be issued and the orders of the court by which such receiver is appointed.

(b) If there should be any default by the authorizing subdivision in the payment of any installment of rent or in the performance of any agreement required to be made or performed by it under the provisions of any lease agreement described in section 22-21-330, the authority and the trustee under any indenture, or either of them:

(1) May, by mandamus, injunction or other proceedings, compel performance by the officials of the author-

izing subdivision of their duties respecting the payment of the rentals required to be paid and performance of the agreements on the part of the authorizing subdivision required to be performed under any such lease agreement; and

(2) Shall be entitled to a judgment against the authorizing subdivision for all monetary payments required to be made by the authorizing subdivision under the provisions of such lease agreement with respect to which the authorizing subdivision is then in default.

(c) The remedies specified in this section shall be cumulative to all other remedies which may otherwise be available, by law or contract, for the benefit of the holders of the securities and the coupons applicable thereto. (Acts 1982, No. 82-418, p. 629, § 22.)

§ 22-21-332. Investment of funds.

(a) To the extent permitted by the contracts of the authority with the holders of its securities and if not otherwise specifically prohibited by any other provision of this article, the authority may invest any portion of the principal proceeds derived from the sale of any of its securities which is not then needed for any of the purposes for which such securities were authorized to be issued, the moneys held in any special fund created pursuant to any resolution or indenture authorizing or securing any of its securities, and any other moneys of the authority not then needed by it, in any of the following:

(1) Federal securities;

(2) Any debt securities that are direct obligations of any agency of the United States of America;

(3) Interest-bearing bank time deposits and interest-bearing bank certificates of deposit; and

(4) Interest-bearing time deposits and interest-bearing certificates of deposit of any federally-chartered savings and loan association.

(b) Any securities, time deposits or certificates of deposit in which any such investment is made may, at any time and from time to time, be sold or otherwise converted into cash. The income derived from any such investments shall be disbursed on order of the board for any purpose for which the authority may lawfully expend funds. (Acts 1982, No. 82-418, p. 629, § 23.)

§ 22-21-333. Exemptions from taxation.

All properties of an authority, whether real, personal or mixed, and the income therefrom, all securities issued by an authority and the coupons applicable thereto and the income therefrom, and all indentures and other instruments executed as security therefor, all leases made pursuant to the provisions of this article and all revenues derived from any such leases, and all deeds and other documents executed by or delivered to an authority shall be exempt from any and all taxation by the state, or by any county, municipality or other political subdivision of the state, including, but without limitation to, license and excise taxes imposed in respect of the privilege of engaging in any of the activities in which an authority may engage. An authority shall not be obligated to pay or allow any fees, taxes or costs to the judge of probate of any county in respect of its incorporation, the amendment of its certificate of incorporation or the recording of any document. Further, the gross proceeds of the sale of any property used in the construction and equipment of any health care facilities for an authority, regardless of whether such sale is to such authority or any contractor or agent thereof, shall be exempt from the sales tax imposed by article 1 of chapter 23 of Title 40 and from all other sales and similar excise taxes now or hereafter levied on or with respect to the gross proceeds of any such sale by the state or any county, municipality or other political sub-

division or instrumentality of any thereof; and any property used in the construction and equipment of any health care facilities for an authority, regardless of whether such property has been purchased by the authority or any contractor or agent thereof, shall be exempt from the use tax imposed by article 2 of chapter 23 of Title 40 and all other use and similar excise taxes now or hereafter levied on or with respect to any such property by the state or any county, municipality or other political subdivision or instrumentality of any thereof. (Acts 1982, No. 82-418, p. 629, § 24.)

§ 22-21-334. Nonapplicability of Ethics Act.

The provisions of chapter 25 of Title 36 shall, any provision thereof to the contrary notwithstanding, not apply to any authority, the members of its board or any of its officers or employees. (Acts 1982, No. 82-418, p. 629, § 25.)

§ 22-21-335. Nonapplicability of competitive bid laws.

The provisions of articles 2 and 3 of chapter 16 of Title 41 shall not apply to any authority, the members of its board or any of its officers or employees. (Acts 1982, No. 82-418, p. 629, § 26.)

§ 22-21-336. Transfer of funds and assets to authority.

Any municipality or county, any public hospital corporation and any other public agency, authority or body are hereby authorized to transfer and convey to any authority, with or without consideration:

(1) Any health care facilities and other properties, real or personal, and all funds and assets, tangible or intangible, relative to the ownership or operation of any such health care facilities that may be owned by such municipality, county, public hospital corporation or other public agency, authority or body, as the case may be, or

that may be jointly owned by any two or more thereof, including, without limiting the generality of the foregoing, any certificates of need, assurances of need or other similar rights appertaining or ancillary thereto, irrespective of whether they have been exercised; and

(2) Any funds owned or controlled by such municipality, county, public hospital corporation or other public agency, authority or body, as the case may be, or jointly by any two or more thereof, that may have been raised or allocated for any of the purposes for which such authority shall have been organized, whether or not such property is considered necessary for the conduct of the governmental or public functions (if any) of such municipality, county, public hospital corporation or other public agency, authority or body.

Such transfer or conveyance shall be authorized by an ordinance or resolution duly adopted by the governing body of such municipality or county or by the board of directors or other governing body of such public hospital corporation or other public agency, authority or body, as the case may be, and it shall not be necessary, any provision of law to the contrary notwithstanding, to obtain any certificate of need, assurance of need or other similar permit for any such transfer or conveyance. In the event of the transfer of any health care facilities to the authority, any hospital tax proceeds, other tax proceeds and other revenues apportioned or allocated to or for the benefit of the prior owner or operator of such health care facilities or for patient care at such health care facilities shall thereafter be paid to the authority. (Acts 1982, No. 82-418, p. 629, § 27.)

§ 22-21-337. Disposition of earnings of authority.

An authority shall be a public corporation or authority and no part of its net earnings remaining after payment

of its expenses shall inure to the benefit of any individual, firm or corporation, except that in the event the board shall determine that sufficient provision has been made for the full payment of the expenses, securities and other obligations of the authority, than any portion, as determined by the board, of the net earnings of the authority thereafter accruing may, in the discretion of the board, be paid to one or more of its authorizing subdivisions. (Acts 1982, No. 82-418, p. 629, § 28.)

§ 22-21-338. Authority as designated agency for purposes of division 2 of article 4 of this chapter.

An authority shall constitute a "hospital corporation" as that term is used in division 2 of article 4 of this chapter; and any county otherwise authorized to do so may designate any authority having the power to own and operate health care facilities situated in such county as the agency of such county to acquire, construct, equip, operate and maintain public hospital facilities in such county, in the manner and with the consequences specified in said division 2. Such authority shall, if so designated, receive the proceeds from any special public hospital tax referred to in said division 2. Further, the reincorporation hereunder of any public hospital corporation that has theretofore been designated as the agency of a county to acquire, construct, equip, operate and maintain public hospital facilities in such county shall in no way impair or invalidate such designation, and such reincorporated public hospital corporation shall continue as such (with the consequences specified in said division 2) just as if it had not been reincorporated hereunder. Nothing in this section shall, however, be construed in any manner to limit any rights or powers otherwise conferred upon an authority pursuant to any other provision of this article. (Acts 1982, No. 82-418, p. 629, § 29.)

§ 22-21-339. Dissolution of authority.

At any time when the authority does not have any securities outstanding, and when there shall be no other obligations assumed by the authority that are then outstanding, the board may adopt a resolution, which shall be duly entered upon its minutes, declaring that the authority shall be dissolved. Upon the filing for record of a certified copy of said resolution in the office of the judge or probate in which the certificate of incorporation of the authority was filed, the authority shall thereupon stand dissolved, and in the event that it owned any assets or property at the time of its dissolution, the title to all its assets and property shall, subject to any constitutional provision or inhibition to the contrary, thereupon vest in one or more counties or municipalities in such manner and interests as may be provided in the said certificate of incorporation; provided however, that if the said certificate of incorporation contains no provision respecting the vesting of title to the assets and property of the authority, title to all such assets and property shall, subject to any constitutional provision or inhibition to the contrary, thereupon vest in its authorizing subdivisions as tenants in common. (Acts 1982, No. 82-418, p. 629, § 30.)

§ 22-21-340. Multiple corporations permitted.

Neither the formation or dissolution of one authority hereunder nor the reincorporation hereunder of a public hospital corporation shall prevent the subsequent incorporation hereunder of another authority or the subsequent reincorporation hereunder of another public hospital corporation pursuant to authority granted by one or more of the same authorizing subdivisions. Further, any county may authorize the incorporation of an authority hereunder notwithstanding the existence in such county of a public hospital corporation designated as the agency of such

county with respect to public hospital facilities therein pursuant to the provisions of division 2 of article 4 of this chapter. (Acts 1982, No. 82-418, p. 629, § 31.)

§ 22-21-341. Reincorporation of existing corporations.

Any public hospital corporation may be reincorporated under this article, avail itself of all rights, powers and privileges and become subject to all duties, obligations and responsibilities conferred or imposed by this article, in the following manner:

(1) The board of directors or other governing body of such public hospital corporation shall adopt a resolution stating that it proposes and applies for permission to reincorporate hereunder and containing a form of proposed certificate of reincorporation, which such certificate of reincorporation shall include, with the necessary changes in detail, the information required to be included in a certificate of incorporation described in section 22-21-314 other than that referred to in subdivision (b) (1) thereof.

(2) Such public hospital corporation shall as promptly as practicable thereafter file a certified copy of such resolution with the governing body of each county or municipality that authorized the formation of such public hospital corporation (and, with respect to any public hospital corporation organized under the provisions of article 6 of this chapter, the governing body of any other municipality that is then a "member" thereof); and each such county and municipality shall be deemed an "authorizing subdivision" with respect to any such public hospital corporation reincorporated hereunder.

(3) The governing body of each authorizing subdivision shall, as promptly as may be practicable after the filing of said certified resolution, review and act upon

the said resolution and application in the manner, with the necessary changes in detail, prescribed in section 22-21-313.

(4) The chairman (or other principal officer) and the secretary of such public hospital corporation shall thereupon sign and acknowledge a certificate of reincorporation, in the form included in the resolution referred to in subdivision (1) of this section, and cause it to be filed for record in the office specified in section 22-21-314.

(5) Thereupon, such certificate of reincorporation shall be filed and recorded by the judge of probate as provided in section 22-21-314, and the existence of such public health corporation as an authority under this article shall begin upon the filing of such certificate of reincorporation as provided for in this section.

No such reincorporation shall in any manner affect the rights of creditors or the rights or liabilities of the public hospital corporation existing at the time of such reincorporation or shall (any provision of law to the contrary notwithstanding) necessitate the obtaining by such reincorporated public hospital corporation or the reissuance of any certificate of need, assurance of need or other similar permit. With respect to any public hospital corporation reincorporated hereunder, any reference herein to a certificate of incorporation thereof shall also include and refer to its certificate of reincorporation. (Acts 1982, No. 82-418, p. 629, § 32.)

§ 22-21-342. Provisions of article exclusive.

Any authority organized under the provisions of this article (as well as any public hospital corporation reincorporated hereunder) shall, insofar as the subject matter of this article is concerned, be governed exclusively by the provisions of this article, which shall not be construed in

pari materia with any other statute. (Acts 1982, No. 82-418, p. 629, § 33.)

§ 22-21-343. Cumulative effect of article.

This article shall not be construed as a restriction or limitation upon any power, right or remedy which any county, municipality or public hospital corporation now in existence or hereafter formed may have in the absence of this article. The provisions of this article are cumulative and shall not be deemed to repeal existing laws, except to the extent such laws are clearly inconsistent with the provisions of this article. (Acts 1982, No. 82-418, p. 629, § 34.)

§ 22-21-344. Use of proceeds from hospital taxes.

Nothing in this article shall be construed to permit the use, by or for the benefit of any authority, of the proceeds of any hospital tax for any purpose, at any place, or in connection with any health care facilities, not permitted or described in the constitutional, statutory or other provision of law authorizing the imposition, levy and collection of such hospital tax or the use of the proceeds therefrom. In order to assure the lawful disposition of such hospital tax proceeds, the board may require the deposit thereof into special funds or accounts established for that purpose and the accounting therefor in such manner as the board may deem necessary. (Acts 1982, No. 82-418, p. 629, § 35.)

ARTICLE 11A.

ADDITIONAL POWER OF HEALTH CARE AUTHORITIES.

Division 1.

Certain Additional Powers.

§ 22-21-350. Definitions.

The following words and phrases used in this division shall, unless the context clearly indicates otherwise, have the following respective meanings:

(1) AUTHORITY. A public corporation organized, and any public hospital corporation reincorporated, pursuant to the provisions of the enabling statute.

(2) AUTHORIZING RESOLUTION. A resolution adopted by the board authorizing an arrangement by which an authority is to furnish office space to a nonhospital-based physician, dentist or other health care professional for use in his private practice.

(3) AUTHORIZING SUBDIVISION. A county or municipality with the governing body of which an application for the incorporation of an authority under the enabling statute, or for the reincorporation of a public hospital corporation thereunder, is filed (and any other county or municipality that may at the time constitute an "authorizing subdivision" within the meaning of the enabling statute).

(4) BOARD. The board of directors of an authority.

(5) DIRECTOR. A member of a board.

(6) ENABLING STATUTE. Act No. 82-418 enacted at the 1982 Regular Session of the legislature (codified as article 11 of chapter 21 of Title 22, as amended).

(7) NATIONALLY RECOGNIZED CREDIT RATING AGENCY. Any credit rating agency that is nationally recognized for skill and expertise in rating the credit of obligations

similar to securities issued by an authority (including, without limiting the generality of the foregoing, Moody's Investors Service, Inc., and Standard & Poor's Corporation).

(8) SECURITIES. Bonds, notes, warrants, certificates of indebtedness or other evidences of indebtedness, including (without limiting the generality of the foregoing) notes issued in anticipation of the sale of any of the foregoing.

The term "federal securities," as used in this division, shall have the same meaning given it in the enabling statute. (Acts 1987, No. 87-745, p. 1458, § 1.)

§ 22-21-351. Legislative findings.

The legislature hereby finds and declares as follows:

(1) That in order to promote the public health of the people of the state of Alabama, the legislature enacted the enabling statute, whereunder, among other things:

a. The several counties and municipalities of the state are effectively authorized to form public corporations known as health care authorities, and

b. Existing public hospital corporations are authorized to reincorporate as health care authorities;

(2) That all such health care authorities are empowered under and pursuant to the enabling statute, among other things:

a. To own and operate public hospitals and other health care facilities;

b. To furnish office space to (among others) any non-hospital-based physician, dentist or other health care professional for use in his private practice, subject to the conditions specified in the enabling statute; and

c. To appoint, employ, contract with, and provide for the compensation of accountants; and

(3) That as a result of significant changes and developments in the economic and commercial structure and practices of health care providers since the enactment of the enabling statute, it is now necessary, in order to enable health care authorities organized or reincorporated pursuant to the provisions of the enabling statute to continue to operate adequately and efficiently, that the legislature:

a. Confer on such health care authorities certain powers in addition to, and in furtherance of, those conferred by the enabling statute; and

b. Provide further for the corporate structure of such health care authorities. (Acts 1987, No. 87-745, p. 1458, § 2.)

§ 22-21-352. Further provision for amendment of certificates of incorporation or reincorporation.

(a) Except as otherwise provided in the last sentence of this subsection, any authority that now exists, or that is hereafter organized or reincorporated (as the case may be) pursuant to the provisions of the enabling statute, shall have the power to amend its certificate of incorporation or certificate of reincorporation, in the manner hereafter provided, so as to provide:

(1) That the governing body of an authorizing subdivision empowered (either alone or jointly with the governing body or bodies of one or more other authorizing subdivisions) to elect or appoint one or more directors shall so elect or appoint all or any of such directors only from a list of nominees, as provided in subdivision (2) below, proposed by the board and otherwise qualified, in accordance with law and with the terms of such certificate of incorporation or certificate of reincorporation (as the case may be), or any amendment

thereto made pursuant to the provisions of the enabling statute, to serve as a director; and

(2) That in the case of a vacancy resulting from the expiration of the stated term of office of any such director, the board shall, not more than 90 nor less than 10 days prior to the expiration of such term of office (or in case of a vacancy resulting from the death or resignation of any such director or from a cause other than the expiration of the stated term of office of any such director, within 30 days following the occurrence of such vacancy):

a. By resolution duly adopted, propose a list of nominees (not less than three in number) for each place or seat on the board that is or is to become vacant as aforesaid; and

b. Cause a certified copy of such resolution to be filed with the governing body of the authorizing subdivision or subdivisions empowered to elect or appoint such director.

To amend its certificate of incorporation or certificate of reincorporation so to provide, the board shall first adopt a resolution approving and authorizing such an amendment to the certificate of incorporation or certificate of reincorporation (as the case may be) of the authority, which amendment shall be set forth in full in the said resolution. Within 40 days following the adoption of such resolution, the chairman and the secretary of the authority shall sign and file for record, in the office of the judge of probate of the county in which the original certificate of incorporation or certificate of reincorporation (as the case may be) of the authority was filed, a certificate in the name and on behalf of the authority, under its seal, reciting the adoption of such resolution by the board and setting forth the proposed amendment. The said judge of

probate shall thereupon record such certificate in an appropriate book in his office. When such certificate has been so filed and recorded, such amendment shall become effective without any further consents or approvals (including, without limitation, any consents or approvals that would otherwise be required by law for amendments to such certificate of incorporation or certificate of reincorporation, as the case may be), and the certificate of incorporation or certificate of reincorporation (as the case may be) of such authority shall thereupon be amended to the extent provided in such amendment. The preceding provisions of this subsection shall not, however apply to any authority if its certificate of incorporation or certificate of reincorporation (as the case may be), or any amendment thereto made pursuant to the provisions of the enabling statute, expressly denies to such authority the power to amend its certificate of incorporation or certificate of reincorporation as provided in this subsection.

(b) Nothing in this section shall be construed to prohibit the inclusion in the original certificate of incorporation or certificate of reincorporation of any authority (or in any amendment thereto made pursuant to the provisions of the enabling statute) of provisions requiring the election or appointment of any director of such authority by the governing body of an authorizing subdivision (either alone or jointly with the governing body or bodies of one or more other authorizing subdivisions) from a list of nominees proposed by the board, provided that the number of directors elected or appointed by the governing body or bodies of one or more authorizing subdivisions without reference to any list of nominees (whether proposed by the board or otherwise) or other condition, is at least a majority of the total number of directors, it being understood and intended by the legislature, however, that in the case of an amendment to the certificate

of incorporation or certificate of reincorporation made pursuant to the provisions of the preceding subsection (a), there shall be no limit on the number of directors that may be elected or appointed by the governing body or bodies of the authorizing subdivisions only from a list of nominees proposed by the board. (Acts 1987, No. 87-745, p. 1458, § 3.)

§ 22-21-353. Further provisions respecting issuance of securities.

Any authority shall have, in addition to the power to sell and issue interest-bearing securities that are limited as to source of payment, the power to sell and issue interest-bearing securities that are not limited as to source of payment and that are general obligations of the authority. The principal of and interest on (and premium, if any) any securities issued by the authority pursuant to the provisions of this section may be secured by:

(1) A pledge of the general credit of the authority; or

(2) Both such a pledge of the general credit of the authority and a special pledge of specific revenues or taxes (or both) identified in the proceedings authorizing the sale and issuance of such securities;

and may also be secured by a trust indenture evidencing such pledge or by a foreclosable mortgage, mortgage indenture or mortgage and trust indenture conveying as security for such securities all or any part of its property. Except to the extent hereinabove provided, all securities issued pursuant hereto shall be considered as securities issued under the enabling statute and shall be subject to all the provisions thereof respecting securities issued thereunder. (Acts 1987, No. 87-745, p. 1458, § 4.)

§ 22-21-354. Further provisions respecting use and disposition of certain property.

In determining the financial effect of an arrangement between an authority and any nonhospital-based physician, dentist or other health care professional for the furnishing of office space to any such person for use in his private practice (for purposes of those provisions of the enabling statute relating thereto), the board:

(1) May, in the determination of the rental and other consideration to be received by the authority from the furnishing of such office space, consider not only the dollar amount of such rental and other consideration being or to be paid by such person pursuant to such arrangement, but also such other circumstances or conditions as it shall generally describe in an authorizing resolution, including (without limitation and by way of example or illustration) factors such as the probability or possibility that such person will refer patients or others to any one or more of the health care facilities owned or operated by the authority or will otherwise make use of, and compensate the authority for, services provided at or by any such health care facilities;

(2) In such event, may (in the authorizing resolution) assign to such other circumstances or conditions such value as in its discretion it deems appropriate and warranted; and

(3) May furnish office space to such person if the dollar amount of the rental and any other consideration being or to be paid to the authority by such person, when added to the value so assigned to such other circumstances and conditions, is not less than the cost of such office space to the authority, any provisions of the enabling statute to the contrary notwithstanding.

And value so assigned in an authorizing resolution to any such other circumstances and conditions shall be conclusive

in the absence of fraud or a gross abuse of discretion. (Acts 1987, No. 87-745, p. 1458, § 5.)

§ 22-21-355. Further provisions respecting investment of funds.

In addition to the investment powers granted by the enabling statute, any authority shall, to the extent permitted by the contracts of such authority with the holders of its securities, have the further power to invest any portion of the principal proceeds derived from the sale of any of its securities not then needed for any of the purposes for which such securities were authorized to be issued, any moneys held in any special fund created pursuant to any resolution or mortgage, mortgage indenture, mortgage and trust indenture or trust indenture authorizing or securing any of its securities, and other moneys of such authority not then needed by it, in any of the following:

(1) Debt securities (whether general obligations or limited or special obligations) of any state, territory or possession of the United States of America and of any political subdivision of any such state, territory or possession, but if and only if at the time of their acquisition for the account of the authority, such securities are rated by a nationally recognized credit rating agency in one of its four highest rating categories;

(2) Commercial paper of a corporation incorporated under the laws of any state of the United States of America, but if and only if at the time of the acquisition thereof for the account of the authority, such commercial paper is rated "prime one" (or the equivalent thereof) by a nationally recognized credit rating agency;

(3) Banker's acceptances endorsed or guaranteed by a bank whose senior long-term debt obligations are, at the time of the acquisition of such acceptances for the account of the authority, rated by a nationally recog-

nized credit rating agency in one of its three highest rating categories (or by a bank that is owned or controlled by a bank holding company whose senior long-term debt obligations are, at the time of the acquisition of such acceptances for the account of the authority, rated by a nationally recognized credit rating agency in one of its three highest rating cateogries);

(4) Bonds and debentures of a corporation incorporated under the laws of any state of the United States of America, but if and only if at the time of the acquisition thereof for the account of the authority, such bonds or debentures have an investment grade rating (or its equivalent) from a nationally recognized credit rating agency; and

(5) To the extent not prohibited by the Constitution of Alabama:

a. Investments in a money market fund or other similar fund, all or substantially all the assets of which consist of federal securities or other assets in which an authority is permitted, by the enabling statute or by the preceding provisions of this section, to invest moneys directly,

b. Participation certificates in federal securities, and

c. Investment or cash management agreements with a bank whose senior long-term debt obligations are, at the time of the acquisition of any such investment or cash management agreement for the account of the authority, rated by nationally recognized credit rating agency in one of its three highest rating categories (or with a bank that is owned or controlled by a bank holding company whose senior long-term debt obligations are, at the time of the acquisition of any such investment or cash management agreement for the account of the authority, rated by a nationally

recognized credit rating agency in one of its three highest rating categories). (Acts 1987, No. 87-745, p. 1458, § 6.)

§ 22-21-356. Cumulative effect.

The provisions of this division shall be construed as cumulative of the provisions of the enabling statute, shall be construed in pari materia therewith and shall not be deemed to repeal any provisions of the enabling statute or other existing law except to the extent (but only to the extent) that any such provisions of the enabling statute or other existing law clearly conflict, or are clearly inconsistent, with the provisions of this division. (Acts 1987, No. 87-745, p. 1458, § 7.)

Division 2.

Further Additional Powers.

§ 22-21-357. Definitions.

As used in this division, the following terms shall have the following respective meanings unless the context clearly indicates otherwise:

(1) AUTHORITY. Any public corporation now or hereafter organized or reincorporated, as the case may be, pursuant to the provisions of the Health Care Authorities Act.

(2) AUTHORIZING SUBDIVISION. Each county and municipality with the governing body of which the application for the incorporation of any authority under the Health Care Authorities Act or the reincorporation of a public corporation under the Health Care Authorities Act was filed.

(3) COUNTY. Any county in the state of Alabama.

(4) GOVERNING BODY. With respect to a county, its county commission or other like governing body, and, with respect to a municipality, its city or town council, board of commissioners or other like governing body.

(5) HEALTH CARE AUTHORITIES ACT. Act No. 82-418 enacted at the 1982 Regular Session of the legislature of Alabama, as supplemented by Act No. 87-745 enacted at the 1987 Regular Session of the legislature of Alabama (codified as articles 11 and 11A of chapter 21 of Title 22 as amended).

(6) MUNICIPALITY. An incorporated city or town of the state of Alabama. (Acts 1990, No. 90-532, § 1.)

§ 22-21-358. Powers of authorities.

In addition to all other powers at any time conferred on it by law, and subject to any express provisions of its certificate of incorporation or certificate of reincorporation to the contrary, an authority shall (to the extent at the time not prohibited by the Constitution of Alabama) have the following powers, together with all powers incidental thereto or necessary to the discharge thereof in corporate form:

(1) To participate as a shareholder in a corporation, as a joint venturer in a joint venture, as a general or limited partner in a limited partnership or a general partnership, as a member in a nonprofit corporation or as a member of any other lawful form of business organization, which provides health care or engages in activities related thereto;

(2) To make or arrange for loans, contributions to capital and other debt and equity financing for the activities of any corporation of which such authority is a shareholder, any joint venture in which such authority is a joint venturer, any limited partnership or general partnership of which such authority is a general or

limited partnership, any nonprofit corporation in which such authority is a member or any other lawful form of business organization of which such authority is a member, and to guarantee loans and any other obligations for such purposes;

(3) To elect (i) all or any of the members of the board of directors of any nonprofit corporation of which such authority is a member or of which any one or more of the members of the board of directors of such authority is an ex officio member (subject, however, to any contrary or inconsistent provision of the articles of incorporation or bylaws of such nonprofit corporation), and (ii) all or any of the members of the board of directors of any nonprofit corporation that has no members and whose articles of incorporation or bylaws provide for the election of one or more of the members of its board of directors from among members of the board of directors of such authority (subject, however, to any contrary or inconsistent provision of the articles of incorporation or bylaws of such nonprofit corporation); provided, however, that if the board of directors of an authority adopts, and files for record in the office of the judge of probate of that county in which its certificate of incorporation or certificate of reincorporation is filed, a certified copy of a resolution to such effect, the election by such authority of any member of the board of directors of any nonprofit corporation who it would otherwise have the right to elect shall be effective only upon the consent of the governing body of each authorizing subdivision with respect to such authority;

(4) To create, establish, acquire, operate or support subsidiaries and affiliates, either for profit or nonprofit, to assist such authority in fulfilling its purposes;

(5) To create, establish or support nonaffiliated for profit or nonprofit corporations or other lawful business organizations which operate and have as their purposes the furtherance of such authority's purposes;

(6) Without limiting the generality of the preceding subdivisions (4) and (5), to accomplish and facilitate the creation, establishment, acquisition, operation or support of any such subsidiary, affiliate, nonaffiliated corporation or other lawful business organization, by means of loans of funds, leases of real or personal property, gifts and grants of funds or guarantees of indebtedness of such subsidiaries, affiliates and non-affiliated corporations;

(7) To indemnify any person (including for purposes of this subdivision such person's estate and personal representatives) made or threatened to be made a party to any action or proceeding, whether civil or criminal, by reason of the fact that he or she is or was a board member, officer, or a physician acting as an agent of such authority in the performance of duties delegated by the board of directors as contained in the medical staff bylaws, medical staff rules and regulations, or policies adopted by the board of directors of such authority, or serves or served any other corporation or other entity or organization (whether for profit or not for profit) in any capacity at the request of the authority while he or she was a board member, officer of the authority, or a physician acting as an agent of such authority as stated above, against all judgments, fines, amounts paid in settlement and reasonable expenses (including, without limitation, attorneys' fees actually and necessarily incurred) as a result of any such action or proceeding, or any appeal therein; provided, however, that nothing herein shall be construed as permitting indemnification of any person:

a. In connection with any malpractice action or proceeding arising out of or in any way connected with such person's practice of his profession;

b. In connection with an action or proceeding by such authority in which a person is adjudged liable to such authority; or

c. In connection with any other action or proceeding in which such person is adjudged liable on the basis that personal benefit was improperly received by such person.

(8) To make any other indemnification now or hereafter authorized by law; and

(9) To have and exercise all powers necessary or convenient to effect any or all the purposes for which authorities are organized. (Acts 1990, No. 90-532, § 2.)

§ 22-21-359. Legislative intention.

It is the intent of the legislature by the passage of this division to clarify existing provisions of statutory law respecting the powers of authorities. To that end, the grant to such authorities of the powers specified in section 22-21-358 shall be deemed declarative of existing statutory law and shall therefore have both a prospective and a retroactive or retrospective operation. (Acts 1990, No. 90-532, § 3.)

The Sherman Antitrust Act of 1890

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, Pub.L. 101-588, § 4(a), 104 Stat. 2880.)

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 12, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Nov. 16, 1990, Pub.L. 101-588, § 4(b), 104 Stat. 2880.)